Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 89–29)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback rates issued January 4, 1988, to October 17, 1988, inclusive, pursuant to Subpart C, Part 191, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded or issued by, and the date on which it was issued.

(DRA–1–09)
Dated: February 15, 1989.
File: 221181

JOHN DURANT,
Director,
Commercial Rulings Division.

(A) Company: Ametek, Specialty Metal Products Div.
Articles: Pot blanks
Merchandise: Type 3004 aluminum sheets clad with type 1145 aluminum
Factory: Eighty Four, PA
Statement signed: May 20, 1988
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, July 27, 1988
Revokes: T.D. 88–76–W to cover successorship from Pfizer, Inc., Minerals, Pigments & Metals Div.

(B) Company: Anheuser-Busch, Inc.
Articles: Beer
Merchandise: Hops (humulus lupulus)

Factories: St. Louis, MO; Newark, NJ; Van Nuys & Fairfield, CA; Tampa & Jacksonville, FL; Houston, TX; Columbus, OH; Merrimack, NH; Williamsburg, VA; Baldwinsville, NY; Fort Collins, CO
Statement signed: June 23, 1988
Basis of claim: Used in
Rate issued by RC of Customs in accordance with § 191.25(b) (2): San Francisco, July 11, 1988
Revokes: T.D. 84–155–A to cover additional factory

(C) Company: BASF Corp., Chemical Div.
Articles: Di-octyl phthalate (D.O.P.)
Merchandise: 2-ethylhexanol (2-EH) (octyl alcohol)
Factory: South Kearny, NJ
Statement signed: August 27, 1984
Basis of claim: Used in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, March 8, 1988
Revokes: T.D. 85–1–C to cover successorship from Badische Corp.

(D) Company: Ball Corp.
Articles: Containers and parts
Merchandise: Aluminum alloy sheets
Factories: Golden & Findlay, OH; Saratoga Springs, NY; Williamsburg, VA; Fairfield, CA; Conroe, TX
Statement signed: July 16, 1987
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Los Angeles (San Francisco Liquidation), March 23, 1988

(E) Company: Briggs & Stratton Corp.
Articles: Internal combustion engines, gasoline and kerosene; electric starter and lawn mower motors; lock and key assemblies
Merchandise: Zinc, slab and ingot; aluminum, molten and ingot; silicon metal; component parts
Factories: Wauwatosa (2), Glendale, West Allis (2), Menomonee Falls, WI; Perry, GA
Statement signed: December 22, 1987
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Houston, April 4, 1988

(F) Company: Burlington Industries, Inc.
Articles: Polyester yarn
Merchandise: Polyester fiber
Factories: Monticello, AR; Galsgow, VA
Statement signed: May 30, 1988
Basis of claim: Appearing in

Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, June 17, 1988
Revokes: T.D. 70–189–T to cover additional factory

(G) Company: B. C. Cook & Sons Enterprises, Inc.
Articles: Bulk concentrated tangerine juice for manufacturing; blended concentrated tangerine juice for manufacturing; concentrated orange juice for manufacturing
Merchandise: Concentrated tangerine juice for manufacturing; concentrated orange juice for manufacturing
Factory: Plymounth, IN
Statement signed: February 12, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: Miami, April 4, 1988

(H) Company: Crystal Technology, Inc.
Articles: Crystal wafers
Merchandise: Niobium pentoxide (Columbium pentoxide)
Factories: Palo Alto, CA (2)
Statement signed: December 17, 1987
Basis of claim: Used in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): San Francisco, January 14, 1988
Revokes: T.D. 81–53–J to cover additional factory

(I) Company: Cyprus Metec
Articles: Tungsten powder and pellets; Molybdenum powder and pellets
Merchandise: Ammonium paratungstate; ammonium dimolybdate; molybdic oxide
Factory: Winslow, NJ
Statement signed: July 12, 1988
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, October 17, 1988
Revokes: T.D. 83–257–M to cover name change from Metec Inc.

(J) Company: E. I. du Pont de Nemours & Co., Inc.
Articles: "TYVEK" spunbounded olefins
Merchandise: High density polyethylene resin (HDPE)
Factory: Richmond, VA
Statement signed: July 22, 1987
Basis of claim: Used in, less valuable waste
Rate forwarded to RC of Customs: Boston, March 21, 1988

(K) Company: E. I. du Pont de Nemours & Co., Inc.
Articles: Chromic oxide; chromium dioxide
Merchandise: Ammonium dichromate; chromic oxide

Factory: Newport, DE
Statement signed: October 28, 1987
Basis of claim: Used in
Rate forwarded to RCs of Customs: New York & Boston (Baltimore Liquidation), March 29, 1988

(L) Company: Fermenta Plant Protection Co.
Articles: Bravo 500 a/k/a Daconil flowable, Nopcocide N40D or Chlorothalonil 500
Merchandise: Daconil 2787 (technical tetrachloroiso-phthalonitrile)
Factory: Houston, TX
Statement signed: March 18, 1988
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, May 2, 1988
Revokes: T.D. 84–169–T to cover successorship from SDS Biotech Corp.

(M) Company: Fermenta Plant Protection Co.
Articles: Daconil 2787 (technical tetrachloroisophthalonitrile) and Bravo 500
Merchandise: Activated carbon and isophthalonitrile
Factory: Houston, TX
Statement signed: March 18, 1988
Basis of claim: Used in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, May 3, 1988
Revokes: T.D. 84–169–U to cover successorship from SDS Biotech Corp.

(N) Company: Hammond Lead Products, Inc.
Articles: Various lead products
Merchandise: Lead pig and ingots
Factories: Hammond, IN; Pottstown, PA
Statement signed: October 13, 1987
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Chicago, April 8, 1988
Revokes: T.D. 81–91–N

(O) Company: Huls America, Inc.
Articles: Plastic sheet and film
Merchandise: Methacrylate/butadiene styrene thermoplastic powder; titanium dioxide pigment
Factory: Edison, NJ
Statement signed: July 15, 1988
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, August 18, 1988

Revokes: T.D. 85–165–S to cover successorship from Nuodex, Inc.

(P) Company: Huls America, Inc.
Articles: Plasticizers; vinyls; lubricants (oil and grease)
Merchandise: Ethyl hexyl alcohol; tri-decyl alcohol; adipic acid; isodecyl alcohol
Factory: Chestertown, MD
Statement signed: July 15, 1988
Basis of claim: Used in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, October 17, 1988
Revokes: T.D. 84–123–O to cover successorship from Nuodex, Inc.

(Q) Company: Key Pharmaceuticals, Inc.
Articles: Pharmaceutical products
Merchandise: Theophylline anhydrous USP XXI powder
Factories: Miami, FL; Las Piedras, PR
Statement signed: September 29, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, April 4, 1988

(R) Company: LB International Inc.
Articles: Pigment colored and surface textured leather
Merchandise: Leather in the rough, partially finished or finished
Factories: Johnstown, NY (5); Gloversville, NY (3)
Statement signed: March 18, 1988
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, May 2, 1988
Revokes: T.D. 81–123–Q to cover successorship from Leather's Best, Inc.

(S) Company: Eli Lilly and Co.
Articles: Spike, graslan, perflan (tebuthiuron formulations); tebuthiuron tech., carbamoyl chloride
Merchandise: 4-methyl-3-thiosemicarbazide
Factory: Lafayette, IN
Statement signed: August 10, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: Chicago, April 4, 1988

(T) Company: Lonza, Inc.
Articles: Ethylene bis stearamide (Acrawax)
Merchandise: Ethylene diamine
Factory: Williamsport, PA
Statement signed: July 25, 1988
Basis of claim: Used in

Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, September 9, 1988
Revokes: T.D. 88–42–L to cover successorship from Glyco, Inc.

(U) Company: Jos. H. Lowenstein & Sons, Inc.
Articles: Tanners grease
Merchandise: Wool grease (oil)
Factory: Brooklyn, NY
Statement signed: February 10, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, March 29, 1988
Revokes: T.D. 53819–H as amended by 55873–C and 68–144–L

(V) Company: Metal Carbides, Inc.
Articles: Tungsten carbide rolls, shear blades, slitter knives, blanks, dies, machine parts and other tooling
Merchandise: Tungsten powder, cobalt, titanium carbide, tantalum carbide
Factory: Youngstown, OH
Statement signed: September 24, 1987
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): Chicago, January 4, 1988
Revokes: T.D. 69–172–P to cover name change and deletion of factory

(W) Company: Metal Container Corp.
Articles: Can bodies and parts thereof
Merchandise: Aluminum alloy sheets, coils, or strips
Factories: Jacksonville & Gainesville, FL; Columbus, OH; Arnold, MO; Carson, CA; Oklahoma City, OK; Windsor, CO; New Windsor, NY
Statement signed: June 23, 1988
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): San Francisco, July 11, 1988
Revokes: T.D. 86–126–N to cover additional factories

(X) Company: Metropolitan Alloys Corp.
Articles: Zinc alloy
Merchandise: Special high grade zinc ingots
Factory: Detroit, MI
Statement signed: October 23, 1987
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, April 14, 1988

(Y) Company: Mobay Corp.
Articles: Isocyanates

Merchandise: Aniline
Factories: Baytown, TX; New Martinsville, WV
Statement signed: October 21, 1987
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to RC of Customs: New York, March 14, 1988

(Z) Company: The Pillsbury Co.
Articles: Frozen assorted vegetables and side dishes
Merchandise: Broccoli, fresh and frozen (cut and spears); cauliflower, fresh and frozen; spinach, fresh and frozen (leaf); brussel sprouts, fresh and frozen
Factories: Watsonville, CA; Belvidere, IL
Statement signed: February 5, 1988
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Chicago, March 29, 1988

APPROVALS UNDER T.D. 84–49

(1) Company: LL&E Petroleum Marketing, Inc.
Articles: Aviation and motor gasoline; special naphthas; jet fuel; fuel oil
Merchandise: Crude petroleum
Refinery: Saraland, AL
Statement signed: December 21, 1987
Basis of claim: As provided in T.D. 84–49
Rate forwarded to RC of Customs: New Orleans, March 14, 1988

(2) Company: Texas City Refining, Inc.
Articles: Petroleum and petroleum products
Merchandise: Crude petroleum and crude petroleum derivatives
Refinery: Texas City, TX
Statement signed: December 17, 1987
Basis of claim: As provided in T.D. 84–49
Rate forwarded to RC of Customs: Houston, March 21, 1988
Revokes: T.D. 67–53–1

(T.D. 89–30)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR JANUARY 1989

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and

others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holidays: Monday, January 2, 1989, and Monday, January 16, 1989.

Greece drachma:

January 3, 1989	$0.006819
January 4, 1989	.006725
January 5, 1989	.006714
January 6, 1989	.006680
January 9, 1989	.006586
January 10, 1989	.006590
January 11, 1989	.006618
January 12, 1989	.006609
January 13, 1989	.006547
January 17, 1989	.006523
January 18, 1989	.006483
January 19, 1989	.006454
January 20, 1989	.006532
January 23, 1989	.006548
January 24, 1989	.006562
January 25, 1989	.006511
January 26, 1989	.006515
January 27, 1989	.006483
January 30, 1989	.006456
January 31, 1989	.006435

South Korea won:

January 3, 1989	$0.001456
January 4, 1989	.001457
January 5, 1989	.001457
January 6, 1989	.001456
January 9, 1989	.001456
January 10, 1989	.001456
January 11, 1989	.001456
January 12, 1989	.001457
January 13, 1989	.001458
January 17, 1989	.001458
January 18–19, 1989	.001459
January 23, 1989	.001461
January 24, 1989	.001462
January 25–27, 1989	.001464
January 30–31, 1989	.001463

Taiwan N.T. dollar:

January 3–4, 1989	N/A
January 5, 1989	$0.035448
January 6, 1989	.035461
January 9, 1989	.035461
January 10, 1989	.035461
January 11, 1989	.035958

FOREIGN CURRENCIES—Variances from quarterly rate for January, 1989 (continued):

Taiwan N.T. dollar (continued):

January 12, 1989	$0.036036
January 13, 1989	.036049
January 17, 1989	.035997
January 18, 1989	.035971
January 19, 1989	.035984
January 20, 1989	.036010
January 23, 1989	.036062
January 24–25, 1989	.036114
January 26, 1989	.036101
January 27, 1989	.036114
January 30–31, 1989	.036101

(LIQ–03–01 S:NISD CIE)

Dated: February 8, 1989.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 89–31)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE FOR JANUARY 1989

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 89–16 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holidays: Monday, January 2, 1989, and, Monday, January 16, 1989.

Austria schilling:

January 18, 1989	$0.076190
January 19, 1989	.076278
January 27, 1989	.076336
January 30, 1989	.076435
January 31, 1989	.075637

FOREIGN CURRENCIES—Variances from quarterly rate for January, 1989 (continued):

Belgium franc:

January 18, 1989	$0.025530
January 19, 1989	.025589
January 27, 1989	.025654
January 30, 1989	.025674
January 31, 1989	.025432

Denmark krone:

January 18, 1989	$0.139315
January 19, 1989	.137931
January 20, 1989	.137988
January 27, 1989	.138313
January 30, 1989	.138293
January 31, 1989	.137174

France franc:

January 18, 1989	$0.156937
January 19, 1989	.157085
January 27, 1989	.157778
January 31, 1989	.156593

Germany deutsche mark:

January 18, 1989	$0.534474
January 19, 1989	.535676
January 27, 1989	.536769
January 30, 1989	.537924
January 31, 1989	.532340

Ireland pound:

January 18, 1989	$1.429600
January 19, 1989	1.434000
January 27, 1989	1.436500
January 30, 1989	1.437500
January 31, 1989	1.425000

Italy lira:

January 18, 1989	$0.000731
January 19, 1989	.000731
January 31, 1989	.000730

FOREIGN CURRENCIES—Variances from quarterly rate for January, 1989 (continued):

Japan yen:	
January 31, 1989	$0.007663
Netherlands guilder:	
January 18, 1989	$0.473485
January 19, 1989	.474496
January 30, 1989	.476417
January 31, 1989	.471587
New Zealand dollar:	
January 31, 1989	$0.601500
Portugal escudo:	
January 18, 1989	$0.006523
January 19, 1989	.006527
January 31, 1989	.006532
Switzerland franc:	
January 17, 1989	$0.634317
January 18, 1989	.628812
January 19, 1989	.628536
January 27, 1989	.630318
January 30, 1989	.633232
January 31, 1989	.625117

(LIQ-03-01 S:NISD CIE)

Dated: February 8, 1989.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 89-32)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback rates issued June 10, 1987 to June 9, 1988, inclusive, pursuant to Subpart C, Part 191, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded or issued by, and the date on which it was issued.

(DRA-1-09)
Dated: February 21, 1989
File: 221199

JOHN DURANT,
Director,
Commercial Rulings Division.

(A) Company: American-National Can Co.
Articles: Can bodies; touch and go ends (pull or press tab ends); aluminum alloy containers
Merchandise: 99% aluminum ingots, tees, hogs or sows/aluminum alloy ingots; tees, hogs, or sows/aluminum alloy sheets, strip
Factories: Various factories as listed in statement
Statement signed: July 8, 1987
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): Los Angeles (San Francisco Liquidation), April 21, 1988
Revokes: T.D. 77-293-Q to cover successorship from National Can Corp.

(B) Company: Borg-Warner Chemicals, Inc.
Articles: Polymer additives and alkyphenols
Merchandise: Phenol (carbolic acid or hydroxybenzene)
Factories: Oxnard, CA; Ottawa, IL; Washington & Morgantown, WV
Statement signed: September 30, 1987
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, June 8, 1988

(C) Company: Bristol-Myers Barceloneta, Inc.
Articles: Pharmaceuticals produced in various forms
Merchandise: Sodium ethyl hexanoate salt; ampicillin trihydrate; cephapirin acid; hetacillin; 6-aminopenicillanic acid (6-APA); D-(-)-phenylglycine chloride hydrochloride (PGH); B-naphthalene sulphonic acid (BNSA); 4-pyridylmercaptoacetyl chloride hydrochlorido (PTA); d1-mandelic acid; D-(-)-p-hydroxphynylglycine dane salt (Dane Salt); 4-pyridylmercaptoacetic acid: 7-aminocephalosporanic acid (7-ACA); trimethylchlorosilane; sodium ampicillin; amoxicillin trihydrate; sodium cephapirin; sodium oxacillin; cefadroxyl; hetacillin potassium; sodium cloxacil-

lin; sodium methicillin, potassium phenethicillin; sodium dicloxacillin; potassium ampicillin; lysine (anhydrous); ceforanide; benzathine cephapirin; sodium nafcillin and sodium cefazolin
Factory: Barceloneta, PR
Statement signed: September 15, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, June 8, 1988
Revokes: T.D.s 78–470–B; 85–165–D, and 86–70–C to cover successorship from Brischem, Inc.; Bristol Alpha Corp., and Bristol de Puerto Rico, Inc., respectively

(D) Company: B. C. Cook & Sons Enterprises, Inc.
Articles: Grapefruit juice from concentrate; frozen concentrated grapefruit juice; bulk concentrated grapefruit juice
Merchandise: Concentrated grapefruit juice for manufacturing
Factory: Plymouth, IN
Statement signed: February 12, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: Miami, June 9, 1988

(E) Company: E. I. Du Pont de Nemours & Co., Inc.
Articles: Sensitized photographic films (bright light etchable (BLE) films)
Merchandise: Bright light etchable (BLE) curds
Factory: Parlin, NJ
Statement signed: February 16, 1988
Basis of claim: Used in, less valuable waste
Rate forwarded to RCs of Customs: Boston & New York, May 25, 1988

(F) Company: E. I. Du Pont de Nemours & Co., Inc.
Articles: Assure herbicides
Merchandise: Quinofop ethyl a/k/a/ 2-[4-[(6-chloro-2-quinoxalinyl) oxy]phenoxy] propionic acid a/k/a/ quizalofop ethyl a/k/a/ DPX Y6202
Factory: El Paso, IL
Statement signed: March 7, 1988
Basis of claim: Used in
Rate forwarded to RCs of Customs: Boston (Baltimore Liquidation) & New York, May 25, 1988

(G) Company: E. I. Du Pont de Nemours & Co., Inc.
Articles: Polyamic acid; polyimide resin, parts, shapes and films; FPC bases
Merchandise: Pyromellitic dianhydride
Factories: Circleville, OH; Newark, DE; Towanda, PA; Parlin, NJ
Statement signed: February 2, 1988

Basis of claim: Used in
Rate forwarded to RCs of Customs: Boston (Baltimore Liquidation) & New York, June 8, 1988

(H) Company: The B.F. Goodrich Co., Specialty Polymers & Chemicals Div.
Articles: Polymer chemicals
Merchandise: Triisobutylene
Factory: Akron, OH
Statement signed: October 8, 1987
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Boston (Baltimore Liquidation), April 13, 1988

(I) Company: The Goodyear Tire and Rubber Co., Chemical Div.
Articles: Nailax/Wingstay 100
Merchandise: Hydroquinone
Factories: Akron, OH; Calhoun, GA; Bayport, Houston, & Beaumont, TX; Niagara Falls, NY
Statement signed: November 5, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, June 9, 1988

(J) Company: Great Lakes Chemical Corp.
Articles: Octabromodiphenyloxide
Merchandise: Diphenyloxide
Factory: El Dorado, AK
Statement signed: December 14, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: Chicago, June 8, 1988

(K) Company: Great Lakes Chemical Corp.
Articles: DE-60F (flame retardant [a pentabromodiphenyloxide product])
Merchandise: Diphenyloxide
Factory: El Dorado, AK
Statement signed: December 16, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: Chicago, June 8, 1988

(L) Company: ICI Americas Inc.
Articles: Paraquat concentrate (Paraquat dichloride)
Merchandise: Methyl chloride
Factory: Pasadena, TX
Statement signed: September 9, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: Boston (Baltimore Liquidation), April 11, 1988

(M) Company: Interface Flooring Systems, Inc.
Articles: Tufted & fusion bonded carpet tiles; uncut roll goods
Merchandise: Polyester web wadding
Factory: LaGrange, GA
Statement signed: August 11, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: Miami, June 9, 1988

(N) Company: International Business Machines Corp.
Articles: Magnetic tape cartridges
Merchandise: Unrecorded magnetic tape
Factory: Tucson, AZ
Statement signed: October 21, 1987
Basis of claim: Appearing in
Rate forwarded to RCs of Customs: Los Angeles (San Francisco Liquidation) & New York, June 8, 1988

(O) Company: A. Johnson Metals Corp.
Articles: Titanium and titanium alloy ingots, slabs and mill products such as billet, bar, sheet, strip, skelp, tube
Merchandise: Titanium sponge and on a pound for pound basis of the titanium content in titanium alloy scrap for designated titanium sponge
Factories: Lionville & Morgantown, PA
Statement signed: January 28, 1988
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, June 9, 1988

(P) Company: L. A. Dreyfus Co.
Articles: Chewing gum base
Merchandise: Polyvinyl acetate; butyl rubber
Factory: Edison, NJ
Statement signed: May 17, 1988
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, June 9, 1988

(Q) Company: C. H. Masland & Sons
Articles: Non-woven fabric
Merchandise: Polyester fiber; polypropylene/olefin fiber
Factories: Various factories as listed in statement
Statement signed: August 28, 1987
Basis of claim: Used in
Rate forwarded to RCs of Customs: Boston (Baltimore Liquidation) & Miami, April 8, 1988

(R) Company: National Steel Corp.
Articles: Zinc-plated or coated steel sheet
Merchandise: Continuous galvanizing grade zinc; high grade zinc

Factories: Portage, IN; Detroit, MI; Granite, IL
Statement signed: May 13, 1986
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, April 11, 1988
Revokes: T.D. 52325–L as amended by 53221–G, 53639–G, 66–12–M, 72–44–K, 74–95–A; and T.D. 68–87–R as amended by 72–44–K

(S) Company: PPG Industries, Inc.
Articles: Disodium salt of Z-aspartic acid (Z-ASP)
Merchandise: Benzyl alcohol; L-aspartic acid
Factory: La Porte, TX
Statement signed: November 2, 1987
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to RCs of Customs: Houston & New York, April 14, 1988

(T) Company: Penco of Lyndhurst, Inc.
Articles: Phenyl trimethyl ammonium chloride
Merchandise: Dimethyl aniline, technical
Factory: Lyndhurst, NJ
Statement signed: March 1, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, May 23, 1988

(U) Company: R & D Services, Inc.
Articles: Food and beverage flavor bases
Merchandise: Concentrated orange juice for manufacturing
Factory: Arecibo, PR
Statement signed: December 11, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: Los Angeles (San Francisco Liquidation), May 16, 1988

(V) Company: R & D Services, Inc., d/b/a Continental Flavors & Fragrances de Puerto Rico
Articles: Various food and beverage flavor bases
Merchandise: Concentrated pineapple juice for manufacturing
Factory: Arecibo, PR
Statement signed: December 11, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: Los Angeles (San Francisco Liquidation), May 25, 1988

(W) Company: R & D Services, Inc., d/b/a Continental Flavors & Fragrances de Puerto Rico
Articles: Various food and beverage flavor bases

Merchandise: Potassium sorbate
Factory: Arecibo, PR
Statement signed: December 11, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: Los Angeles (San Francisco Liquidation), June 9, 1988

(X) Company: The Uniroyal Goodrich Tire Co.
Articles: Yarns; synthetic industrial fabrics
Merchandise: Modacrylic staple fiber
Factories: Ardmore, OK; Opelika, AL; Scottsville, VA; Eau Claire, WI; Hogansville, GA; Winnsboro, SC
Statement signed: May 4, 1987
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, June 10, 1987
Revokes: T.D. 86–126–U to cover successorship from Uniroyal Tire Co., Inc.

(Y) Company: The Uniroyal Goodrich Tire Co.
Articles: Tires; tread rubber
Merchandise: Various chemicals; polyester fabric and cord; synthetic rubber; polyethylene wrap; fiberglass tire cord; bronze-plated bead wire; nylon tire cord; brass plated steel tire cord
Factories: Ardmore, OK; Opelika, AL; Scottsville, VA; Eau Claire, WI; Hogansville, GA; Winnsboro, SC
Statement signed: May 4, 1987
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, June 10, 1987
Revokes: T.D. 86–126–V to cover successorship from Uniroyal Tire Co., Inc.

(Z) Company: U.S. Vanadium Corp.
Articles: Ferrovanadium, Carvan, Nitrovan
Merchandise: Vanadium pentoxide; vanadium trioxide
Factory: Niagara Falls, NY
Statement signed: March 21, 1988
Basis of claim: Used in for Nitrovan and Carvan; Appearing in for Ferrovanadium
Rate forwarded to RC of Customs: New York, June 8, 1988

APPROVALS UNDER T.D. 84–49

(1) Company: Union Oil Company of California, d/b/a Unocal
Articles: Petroleum and petrochemical products
Merchandise: Crude petroleum and petroleum derivatives, classes I, II, III, and IV
Refineries: Rodeo & Wilmington, CA; Lemont, IL; Nederalnd, TX

Statement signed: February 1, 1988
Basis of claim: As provided in T.D. 84-49
Rate forwarded to RC of Customs: Los Angeles, April 12, 1988

* * * * * * *

National Distillers and Chemical Corp., operating under T.D.s 82-182-G, 83-259-T, 84-79-Q, 84-169-R, 83-16-S and 85-165-R has changed its name to Quantum Chemical Corp., Quantum Emery Division.

Witco Chemical Corp. operating under T.D.s 79-214-Z, 80-243-Z, 81-123-Z, 82-225-Y, 82-225-Z, 84-155-Z, 84-194-Z, and 85-139-Y has changed its name to Witco Corporation.

(T.D. 89-33)

REVOCATION OF INDIVIDUAL BROKER'S LICENSE NO. 4423; JAMES P. FLANNELLY

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that the Secretary to the Treasury on November 1, 1988, pursuant to Section 641, Tariff Act of 1930, as amended (19 U.S.C. 1641), and Part 111.74 of the Customs Regulations as amended (19 CFR 111.74), revoked the individual broker's license No. 4423 issued to Mr. James P. Flannelly. This action having received no appeal under 19 U.S.C. 1641(e), is effective as of December 31, 1988.

Dated: February 21, 1989.

VICTOR G. WEEREN,
Director,
Office of Trade Operations.

[Published in the Federal Register, February 27, 1989 (54 FR 8257)]

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., February 17, 1989.

The following are decisions of the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(C.S.D. 89–19)

Drawback: Same condition drawback 19 U.S.C. 1313(j)(1); product withdrawn from a bonded smelting warehouse under 19 U.S.C. 1312, duty paid, and exported in the same condition as withdrawn.

Date: November 3, 1987
File: DRA–1–CO:R:CD:D
219293 RB

MR. LARRY COKE
DEPUTY ASSISTANT REGIONAL COMMISSIONER, OPERATIONS
U.S. CUSTOMS SERVICE, SOUTHWEST REGION
5850 San Felipe Street
Houston, Texas 77057

DEAR MR. COKE:

This is in reference to your memorandum of December 22, 1986, file DRA–4–O:C JWB, attaching a November 17, 1986, letter from a company claiming same condition drawback, under 19 U.S.C. 1313(j)(1), on fluorspar which had been processed from raw fluorspar in a bonded smelting and refining, or class 7, warehouse under 19 U.S.C. 1312. The fluorspar was withdrawn from warehouse with the payment of duty, and was exported in the same condition as withdrawn.

Assuming that there was otherwise compliance with the applicable requirements of law and regulation, based upon an analysis of

established precedent, you are hereby respectfully instructed to liquidate the claim as one correctly for same condition drawback under section 1313(j)(1).

Same condition drawback is payable in connection with imported, duty-paid merchandise which is, among other things, "exported in the same condition as when imported" (19 U.S.C. 1313(j)(1)(A)(ii)). The allowance of same condition drawback in this case thus turns fundamentally upon whether the fluorspar as withdrawn from warehouse may be treated as the "imported, duty-paid merchandise," for purposes of duty drawback.

The product of smelting or refining under 19 U.S.C. 1312, and predecessor provisions (*e.g.*, Act of July 24, 1897, sect.29, 30 Stat. 211), has long been permitted to form a basis for manufacturing drawback under 19 U.S.C. 1313(a) or (b), and predecessor provisions (*ibid.*, sect.30), should the product be withdrawn from warehouse with the payment of duty, and thereafter used in the manufacture or production of other articles which are exported (22 Op. Atty. Gen. 119 (1898), *reprinted in* T.D. 19670, 2 *Synopses of Decisions* 94 (1898); Bureau letter dated March 8, 1944, to Supervising Customs Agent, Baltimore; Bureau letter dated February 23, 1962, to Collector, Chicago (p.3), abstracted as T.D. 55580–VV). But the merchandise entered for warehouse and used in smelting or refining under section 1312, and previous enactments, on the other hand, could not form a basis for manufacturing drawback, should the resulting product be withdrawn with the payment of duty, and exported in the same condition as withdrawn (see T.D. 24010 (1902); Bureau letter dated December 7, 1948, to American Smelting and Refining Co.; Bureau letter dated February 7, 1966, to Collector, Chicago).

The well settled principle underlying the foregoing disparate holdings is that it is not the merchandise entered for warehouse, but rather the smelted or refined product as withdrawn therefrom for consumption, which has been effectively treated, in a drawback sense, as the "imported material on which duties [have] been paid" (22 Op. Atty. Gen., *supra*, at 121, T.D. 19670, *supra*, at 96; Bureau letter dated October 23, 1957, to Collector, Los Angeles (p.2), abstracted as T.D. 54474–A; and the Bureau letters, *supra*). To elaborate briefly, in a manufacturing context, other than "imported duty–paid merchandise," only "drawback products" may form a basis for drawback (see, *e.g.*, 19 CFR 191.2(b)). The smelted or refined product withdrawn from warehouse, however, is not in the nature of a "drawback product." If it were, it could have itself been exported with drawback in the same form as withdrawn, in accordance with the manufacturing provisions, currently either section 1313(a) or (b) (19 CFR 191.2(g)).

Consequently, inasmuch as the smelted or refined product, in its form as withdrawn from warehouse, has been considered as the "imported duty-paid merchandise" for drawback purposes, if this product is not used in manufacture or production following its duty-

paid withdrawal, but is instead exported in the same condition as withdrawn, it may now properly be subjected to drawback under the same condition provision, section 1313(j)(1), this provision of law being effective as to merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of its enactment (December 28, 1980) (Pub. L. 96–609, tit.II, sect.201(b)).

At the same time, however, it is, of course, understood that, from a Customs jurisdictional standpoint, the merchandise entered for warehouse and used therein in smelting or refining has indeed been imported. Hence, in conformance, once again, with the manufacturing drawback precedent relative to class 7 warehouses (see Bureau letter dated October 2, 1942, to Collector, Great Falls), the three-year time limitation from the "date of importation" within which merchandise must be exported under section 1313(j)(1) should likewise be computed as set forth in 19 CFR 101.1(h), and not from the date of the duty-paid withdrawal of the smelted or refined product from warehouse.

(C.S.D. 89–20)

Drawback: The use of an intermodal bill of lading with other evidence to establish the time and fact of exportation under 19 CFR 191.52(c)(2).

Date: September 21, 1988
File: DRA–4–CO:R:C:E 219495 RB 219645
x–DRA–1–01
Category: Drawback

ASSISTANT REGIONAL COMMISSIONER, OPERATIONS
SOUTHWEST REGION
U.S. CUSTOMS SERVICE
5850 San Felipe Street
Houston, Texas 77057

Re: Internal Advice Request Regarding the Use of a "Weighted Average Value Method" for Calculating Drawback Claims

DEAR SIR:

This is in reference to your request for internal advice dated June 9, 1987, regarding the acceptability of a so-called "weighted average value method" for calculating same condition drawback claims under 19 U.S.C. 1313(j)(1). Your office previously approved the use of this method by a company filing its same condition claims in the Southwest Region. However, the company also prepared certificates of delivery in the same manner covering imported merchandise sold

to another party claiming manufacturing drawback under 19 U.S.C. 1313(b).

The Pacific Region, where the manufacturing claims are filed, has, by memorandum dated March 24, 1987, opposed the use of the method in question, following an audit thereof. The company responded to the Pacific Region's memorandum by letter dated May 4, 1987. In addition, in a letter dated April 12, 1988, the company, through its attorney, raised policy and constitutional arguments in order to obtain Headquarters ratification of its use of an average value methodology. The company's January 8, 1987, letter, initially asking that you seek internal advice in this matter, was attached to your submission.

Facts:

A company exclusively imports numerous types of semiconductor devices, approximately 15000 individual device types in all, falling into 29 different overall product lines. A product line encompasses all those individual device types which have certain general characteristics in common, although they have different specific functions and specifications, as well as markedly different values, from one device type to another. As such, one device type would not be fungible with another, nor is it alleged to be (19 CFR 191.2(1)).

The company exports about 4–5% of the devices it imports, and claims same condition drawback under 19 U.S.C. 1313(j)(1) in the Southwest Region, using the accelerated payment and exporter's summary procedures (19 CFR 191.72; 19 CFR 191.53; 19 CFR 191.141(d)). It also supplies imported devices to its customer which claims manufacturing drawback under 19 U.S.C. 1313(b) in the Pacific Region. The company states that the exported articles claimed under section 1313(b) are produced by the customer with the very devices supplied which give rise to the claim, the devices being related thereto by means of their certificate(s) of delivery.

The company, however, uses the existing information on its computer system data base to prepare its same condition claims as well as the certificates of delivery it issues for the devices supplied to its customer. This data base lists the total quantity and value of the devices by product line and import entry; it does not record the quantity and value of the devices by individual device type. Hence, the specific device types exported, or delivered and used in manufacture, are identified for drawback instead by product line, and assigned a "weighted average net unit value" which is computed by product line from a selected import entry. The entry selected for this purpose, notably, may not necessarily contain any of the same device types.

By way of brief illustration, assume that 10 units each of device types "A" and "B," dutiable at $5. and $10. apiece, are imported under entry "1," and 10 units each of device types "B" and "C," dutiable, respectively, at $10. and $6. apiece, are imported under entry

"2," all the device types falling into Product Line "X": on the computer data base, this would be reflected merely as 20 Product Line "X" units worth $150, imported under entry "1," and 20 Product Line "X" units worth $160. imported under entry "2." If 5 "C" units (dutiable at $6. apiece) are later exported, entry "1" could be used to sustain a § 1313(j)(1) claim, with a calculated "weighted average net unit value" of $7.50; if entry "2" is selected, the "value" would be $8. per unit. Either way, there would be a payment of drawback which exceeds the duty paid on the exported merchandise.

The company admits in effect that certain claims may be overpaid in this way, but insists that "over time" the use of its methodology will be "revenue neutral." In contrast to this approach, valuation by individual device type would, at present, entail the company's having to retrieve the paper invoices which form a part of each import entry. The company contends that having to do this would be "costly," and prohibitively "time-consuming."

Issue:

Whether a "weighted average value method," as defined and employed in the circumstances of this case, is acceptable as a means of calculating claims under the same condition drawback law, 19 U.S.C. 1313(j)(1), or under the substitution manufacturing drawback law, 19 U.S.C. 1313(b).

Law and Analysis:

Under same condition drawback, 19 U.S.C. 1313(j)(1), in pertinent part, "[i]f *imported merchandise on which was paid any duty* * * * because of its importation * * * *is exported* * * * then upon such exportation * * * *99 per centum of the amount of* * * * *such duty* * * * *so paid* shall be refunded as drawback" (emphasis added). The mandatory regulations which implement the law in this respect provide that: "An exporter-claimant who desires to export merchandise with drawback under 19 U.S.C. 1313(j) * * * shall * * * identify the import entry * * * under which the merchandise was imported into the United States" (19 CFR 191.141(b)(1)), and, if the entry contains different merchandise, shall "identify with respect to that import entry * * * the imported duty-paid merchandise" on which drawback is claimed (19 CFR 191.22(b)(2); and see 19 CFR 191.141(e)).

Similarly, under substitution manufacturing drawback, 19 U.S.C. 1313(b), in pertinent part, if imported duty-paid and domestic or duty-free merchandise of the same kind and quality are used in the manufacture or production of articles, then upon the exportation of any such articles, drawback may be allowed, but *"the total amount of drawback allow[able] * * * shall not exceed 99 per centum of the duty paid on such imported merchandise"* (emphasis added) (also see 19 CFR 191.2(b); 19 CFR 191.32(a)(1)).

The plain language of the statute and attendant regulations, therefore, definitively precludes the use of an average value meth-

odology for claiming same condition or manufacturing drawback on exported merchandise or articles, in circumstances where, as here, the use of such averages could result in an overallowance of drawback on the claim, *i.e.*, a payment in excess of 99 per centum of the duty paid on the particular merchandise which is exported under § 1313(j)(1), or received and used under § 1313(b), and which may thus properly constitute the underlying focal point of the claim. Each claim must, of course, comply with the law and regulations in this regard, whether it is filed on a single export shipment, or, periodically, on numerous ones, as drawback claims frequently are.

Accordingly, against this backdrop, the company's representation that "over time" its method will be "revenue neutral" is without legal significance. And, parenthetically, it is, in any event, so broad and indefinite as to essentially lack meaning.

In short, the problem in this case, fundamentally, is that the information currently included on the company's computer data base, and used to prepare same condition claims and certificates of delivery (see 19 CFR 191.22(e)), is simply not sufficient for drawback purposes. The specific device types in fact exported, or delivered and used in manufacture, which could lawfully qualify as the basis for a § 1313(j)(1) or (b) drawback claim herein, cannot be identified, and the amount of duty attributable thereto ascertained, with respect to the import entry or entries under which they were imported, as required by law and regulation, in order to obviate a statutorily impermissible overallowance of drawback.

Records which ensure against such an overallowance must consequently be used to support drawback claims, notwithstanding that doing so may be "costly and nonremunerative" (*Bayer, Pretzfelder & Mills, Inc.* v. *United States*, 39 Cust. Ct. 107, 110–111 (1957)). The Pacific Region has observed in this context that other companies dealing with this kind of merchandise have been able to maintain accessible records by device type and import entry satisfactory in its view to establish drawback compliance.

It should be mentioned that Customs has, over the years, consistently disallowed proposals made along the very same lines as those advanced herein (see *e.g.*, Bureau letter dated January 10, 1963, to Supervising Customs Agent (SCA), Baltimore, re: Burlington Industries, Inc.; Bureau letter dated May 23, 1951, to SCA, New Orleans, re: Haspel Brothers, Inc.).

Policy Considerations

From the foregoing discussion, it may readily be seen that, contrary to the company's contention, the legal permissibility of its weighted average approach to claiming drawback is hardly a "close call," thereby undermining the foundation for the argument made in its attorney's April 12, 1988, letter that drawback claims using its average value procedure should be permitted as a matter of policy. Yet, even if the resolution of this case were in doubt, this would

not lawfully enable an approval of the company's drawback record-keeping. It has been repeatedly averred that "[a]ny doubt arising in the decision of a drawback case in the construction of the statute and regulations must be decided in favor of the Government"(*Border Brokerage Co.* v. *United States,* 53 Cust. Ct. 6, 10 (1964); *Nestle's Food Co. (Inc.)* v. *United States,* 16 Ct. Cust. Appl. 451, 455 (1929); *Swan & Finch Co.* v. *United States,* 190 U.S. 143, 146 (1903)).

CONSTITUTIONAL ARGUMENT—UNIFORMITY, DUE PROCESS CLAUSES

The company also maintains, through its attorney's April 12, 1988, letter, that the Uniformity Clause of the U.S. Constitution (Art. 1, § 8, Cl. 1) compels the Pacific Region to follow the Southwest Region in authorizing drawback on the weighted average value methodology; and that "by substantially benefitting those who have had their drawback claims allowed at Houston, the Customs Service would have incurred an obligation to grant an equal benefit to those whose drawback claims are" filed elsewhere. To fail to do so, would, according to the company, be violative of a concept of equal protection under the Due Process Clause of the Fifth Amendment.

Whether the Uniformity Clause, which deals by its specific terms with the laying and collection of duties, would also be applicable to drawback under 19 U.S.C. 1313 is, at best, problematic, none of the cases cited in the attorney's April 12 letter establishing that it would be. But assuming *arguendo* that the Uniformity Clause would apply to drawback under § 1313, the precise argument advanced on behalf of the company in this regard has, at any rate, already been considered in a duty assessment context by the Court of International Trade in *F.W. Myers & Co.* v. *United States,* 9 CIT 19, 615 F. Supp. 569, 570 (1985), and been conclusively repudiated:

> This argument fails to consider that, by protesting the classification of its merchandise and bringing this action plaintiff is ensuring uniformity of classification for this merchandise henceforth * * *. *The fact that identical merchandise was classified differently at another port has no bearing on the proceedings before this Court * * *. There is no reason, therefore, for the Court to adopt contrary assessments made at a different port and thus subrogate the contested resolution of the classification issue set forth herein* (emphasis added) (615 F. Supp. at 573).

The company's Fifth Amendment argument is predicated principally upon Supreme Court decisions which in fact addressed the Equal Protection Clause of the Fourteenth Amendment, relating to state action (*Sioux City Bridge Co.* v. *Dakota Cty.,* 260 U.S. 441 (1923); *Iowa-Des Moines National Bank* v. *Bennett,* 284 U.S. 239 (1931)). Specifically, these decisions were rooted in "intentional discrimination" perpetrated by state tax officials who assessed certain taxpayers as prescribed by law, while illegally undertaxing others similarly situated.

Accordingly, even assuming, in the first place, that a concept of equal protection under the Fifth Amendment could be determinative of a claimant's rights under § 1313, again a doubtful point, and one plainly unsubstantiated by the cases cited in the attorney's April 12 letter, such proposition would, in any event, lack support in the instant case, for there has been no intentional discrimination by Customs officials here (*cf. American Express Co.* v. *United States,* 67 Cust. Ct. 141, 152–153 (1971), *aff'd.,* 60 CCPA 86, 100 (1973) (concept of equal protection under Fifth Amendment held not applicable to Secretary's findings under countervailing duty statute, 19 U.S.C. 1303, but even if it were, the absence of proof of discrimination would deprive it of support in the case at bar)). In the present case, unbeknownst to the Pacific Region, the company's drawback claims were approved in the Southwest Region on the basis of weighted average values, due to an error of judgment. And "mere errors of judgment do not support a claim of discrimination" (*Sioux City,* supra, 447).

There is no constitutional ground compelling Customs to allow the drawback entries of the company's customer, filed in the Pacific Region, which are dependent upon certificates of delivery prepared by the company on the same basis.

Holding:

A "weighted average value method," as defined and employed in the circumstances of this case, is not acceptable as a means of calculating claims under the same condition drawback law, 19 U.S.C. 1313(j)(1), or under the substitution manufacturing drawback law, 19 U.S.C. 1313(b).

(C.S.D. 89–21)

Drawback: The use of a "Weighted Average Value Method" for calculating drawback claims.

Date: March 10, 1988
File: DRA–1 CO:R:C:E
220179 KP
Category: Drawback

REGIONAL COMMISSIONER OF CUSTOMS
SOUTHWEST REGION
5850 San Felipe Street
Houston, Texas 77057–3012

Re: The use of an intermodal bill of lading with other evidence to establish the time and fact of exportation under 19 CFR 191.52 (c)(2).

DEAR SIR:

In your memorandum of February 11, 1988 (your reference DRA–1–O:C JWB), you asked us to review C.S.D. 85–23. We have reconsidered that ruling, and our decision follows:

Facts:

The Regional Commissioner of Customs, Southwest Region, has asked us to reconsider our decision in C.S.D. 85–23. The facts of that case were: An exporter delivers merchandise to a carrier on X day for exportation by microbridge, receiving therefor an intermodal bill of lading. Merchandise delivered to this carrier under these conditions is always exported within Y days after X day, or in those rare cases when it is not, the exporter is so notified by the carrier.

Issue:

May an intermodal bill of lading be used in conjunction with other evidence (in this case, a certification by claimant that no notification was received from the carrier indicating failure to export) to prove the fact and time of exportation as required by 19 CFR 191.52(c)(2)?

Law and Analysis:

Section 191.51, Customs Regulations (19 CFR 191.51), lists five alternative procedures which may be followed in order to establish exportation of articles for drawback purposes. One of those procedures is the notice of exportation method set forth in 19 CFR 191.52. That procedure requires, under 19 CFR 191.52(c), documentary evidence of exportation. This requirement may be satisfied either with a notice of exportation which is certified by Customs at the time of exportation, or with an uncertified notice of exportation. The rules for using an uncertified notice of exportation are provided in 19 CFR 191.52(c)(2), which reads as follows:

> (2) *Uncertified notice of exportation.* An uncertified notice of exportation shall be supported by documentary evidence of exportation, such as the bill of lading, air waybill, freight waybill, Canadian Customs manifest, cargo manifest, or certified copies thereof, issued by the exporting carrier. Supporting documentary evidence shall establish fully the time and fact of exportation and the identity of the exporter.

An intermodal bill of lading is a document prepared by an exporter and submitted along with the exporter's merchandise to an ocean shipper at an inland city. The ocean shipper indicates on the intermodal bill of lading his receipt of the merchandise at the inland city. Usually, an intermodal bill of lading does not refer to the port of exportation or the date of exportation, although it may refer to a particular vessel on which the goods are to be exported.

Thus, an intermodal bill of lading is documentary evidence of exportation, for it certifies in writing that certain goods have been delivered to a particular ocean shipper at an inland city for export.

Moreover, when an ocean shipper acknowledges his receipt of goods for exportation on an intermodal bill of lading and returns it to the exporter, it becomes a document "issued by the exporting carrier." *See* Customs Ruling DRA–1–09 CO:R:CD:D 213299 B, C.S.D. 82–59, 16 Cust. Bull. 782, 784 (1981). Nevertheless, the ordinary intermodal bill of lading, on which the ocean shipper does not indicate the fact, time, and place of exportation, cannot satisfy the evidentiary requirements of 19 CFR 191.52(c)(2) on its own because it does not fully establish all the pertinent facts set forth in the last sentence of that subsection.

As we stated in C.S.D. 85–23, an intermodal bill of lading may be used in conjunction with other evidence to prove the fact and time of exportation under 19 CFR 191.52(c)(2), for the supporting documentary evidence required by that subsection is not limited to only one document. However, any additional evidence offered, like the intermodal bill of lading, must be "documentary evidence of exportation * * * issued by the exporting carrier" as provided in the regulation. Evidence not meeting this requirement cannot be accepted because drawback privileges under the Tariff Act of 1930 are expressly conditioned, by statute, upon compliance with such rules and regulations as the Secretary of the Treasury shall prescribe. *See United States* v. *Lockheed Petroleum Services, Ltd.*, 1 Fed. Cir. (T) 63, 65, 709 F.2d 1472, 1474 (1983).

The only other evidence offered with the intermodal bill of lading in C.S.D. 85–23 to prove the time and fact of exportation was a certification by the drawback claimant that no notification was received from the exporting carrier indicating a failure to export the goods in question. Such a certification is unacceptable as supporting documentary evidence under 19 CFR 191.52(c)(2) because it was not issued by the exporting carrier. Therefore, an intermodal bill of lading on which the exporting carrier has not indicated the fact, time, and place of exportation, submitted in conjunction with a certification from the drawback claimant such as that described in C.S.D. 85–23 is not sufficient to prove the fact and time of exportation under 19 CFR 191.52(c)(2).

Holding:

An intermodal bill of lading may be used in conjunction with other evidence to prove the fact and time of exportation under 19 CFR 191.52(c)(2). However, a certification by a drawback claimant that no notification was received from the exporting carrier indicating a failure to export the merchandise is not acceptable as such evidence. C.S.D. 85–23 (Customs Ruling DRA–1–CO:R:CD:D 217329 GS (Sep. 20, 1984)) is hereby modified accordingly.

(C.S.D. 89–22)

Protest: Title 19 U.S.C. 1515 and 19 CFR 174.30, require that the Notice of Denial of Protest shall include a statement of the reasons for the denial.

Date: October 31, 1988
File: PRO-2-07-CO:R:C:E
220840 GG

DONALD F. BEACH, ESQ.
5881 Leesburg Pike
Suite 303
Falls Church, VA 22041

DEAR MR. BEACH:

This is in response to your September 6, 1988 letter concerning Protest Number 5401–7000038, filed on behalf of your client, Mr. Sharam Bagheri.

The first issue to be addressed is whether the Notice of Denial of Protest dated May 3, 1983 was a proper denial of the protest. The procedural requirements of 19 CFR 174.29 and 174.30 were met in that a decision to deny the protest was made and communicated to you within two years of the date of the filing of the protest. The protest was filed with the Customs Service on July 7, 1987 and notification of denial was mailed on May 3, 1988. As required by statute, your client was informed that he had recourse to judical review. Furthermore, the reasons given for the denial were clearly stated in the last paragraph of the denial letter.

19 U.S.C. 1515 and 19 CFR 174.30 require that the notice of denial of the protest shall include a statement of the reasons for the denial. Pub. L. 96–39, 93 Stat. 304 (July 26, 1979) explained the reasons behind this provision but did not specify the form this requirement was to take. The intent of the amendment was not to change but to give statutory effect to existing law. The district office in question has confirmed that the explanation provided is a full and accurate description of the circumstances leading to the denial. Any dispute on this point is a factual issue which must be resolved in a court of law.

District directors have been designated by regulation to review and act upon protests filed in accordance with § 514, Tariff Act of 1930. In this particular case, the regional office in Miami was asked by the district to assess Mr. Bagheri's application for further review. Based on the reports and information submitted by the district director, which are summarized in the statement included in the notice of denial of the protest, Miami decided that further review was not warranted and sent its recommendation back to the district. We cannot substitute our judgment for that of the office responsible for conducting the review, and therefore the denial of the protest must stand.

You requested that Mr. Bagheri's protest filed on July 7, 1987 be treated as a request for reliquidation or refund of duty under 19 U.S.C. 1520(c)(1). We are unable to do this as the protest was clearly a petition for relief under 19 U.S.C. 1514, the request for relief under 19 U.S.C. 1520(c)(1) was untimely filed, and the Court of International Trade now has exclusive jurisdiction over this matter. The reasons given for the protest and further review on Mr. Bagheri's Customs Form 19 indicate a desire for consideration exclusively under 19 U.S.C. 1514 and 1515 procedures. No reference was made to relief under 19 U.S.C. 1520(c)(1), and the current petition under that provision cannot be granted as this new request was filed more than a year after the entry was liquidated.

For the reasons stated above, we cannot review your case further. Please contact us if you have further questions.

(C.S.D. 89–23)

Valuation: Deduction for international transportation from deductive value of imported merchandise.

Date: October 31, 1988
File: CLA–2 CO:R:C:V 544236 EK
Category: Valuation

AREA DIRECTOR OF CUSTOMS
KENNEDY AIRPORT AREA
Jamaica, New York

Re: Decision on Application for Further Review of Protest No. 1001–5–011625.

DEAR SIR:

This is in reference to your decision on the liquidation of Entry No. 4701–83–891030 dated May 31, 1985. The merchandise was appraised pursuant to deductive value, section 402(d) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA; 19 U.S.C. 1401a(d)).

All interested parties are in agreement that deductive value is the correct basis of appraisement. At issue is the proper allowance for international freight pursuant to section 402(d)(3)(A)(ii) of the TAA. That section provides for a deduction for "the actual costs and associated costs of transportation and insurance incurred with respect to international shipments of the merchandise concerned from the country of exportation to the United States."

The importer indicates that the proper allowance for international freight is that which is noted on the airway bill, the actual prepaid freight charge. Customs rejected the amount noted on the air-

way bill and deducted a freight charge based upon the International Air Traffic Association freight rate. This freight rate was used rather than the amount on the airway bill because the importer failed to provide proof of payment. The importer and the shipper are related.

Issue:

Whether the proper amount to be deducted in appraising imported merchandise pursuant to deductive value is the actual amount listed on the airway bill.

Law and Analysis:

As indicated above, in determining the proper amount to be deducted for appraisement pursuant to deductive value, section 402(d)(3)(A)(ii) clearly states that the *actual* costs of transportation are to be deducted. Although actual proof of payment has not been submitted, the airway bill serves as sufficient evidence of the actual costs of transportation. The figure corresponding to the freight chart is not the actual cost but rather, a mere estimate.

The best evidence available for the transportation cost is the airway bill, *i.e.,* a bill for the services performed.

Holding:

In view of the foregoing, the proper deduction to be made for transportation pursuant to section 402(d)(3)(A)(ii) of the TAA is the amount indicated on the airway bill. You are directed to grant the protest in full. A copy of this decision should be attached to the Form 19, Notice of Action, to be sent to the protestant.

(C.S.D. 89–24)

Valuation: GSP eligibility of wood picture frames manufactured in El Salvador.

Date: October 17, 1988
File: CLA-2 CO:R:C:V 554955 DBI
Category: Valuation

MR. CARLOS R. BUSTAMANTE
4 Calle Poniente #40
Santa Ana, El Salvador
Central America

Re: GSP Eligibility of Certain Wood Picture Frames.

DEAR MR. BUSTAMANTE:

This is in response to your undated request for information regarding the applicability of the Generalized System of Preferences (GSP) to wood picture frames manufactured in El Salvador.

Facts:

You advise that picture frames will be cut and assembled from wood grown in El Salvador. Glass and/or mirrors will be imported into El Salvador where they will be cut and shaped to fit the inside of the frames and inserted therein. You indicate that the glass or mirror will compromise 9 percent of the value of the completed article. You request a ruling on the wood frames alone and on the frames to which a glass or mirror component has been added.

Issue:

Whether the wood frames alone, and the frames with a glass or mirror component inserted, are eligible for duty-free treatment under the GSP.

Law and Analysis:

An article imported directly from a beneficiary developing country (BDC) may qualify for duty-free entry under the GSP only if it meets the country of origin criteria set forth in section 10.176(a), Customs Regulations (19 CFR 10.176(a)). The first of these criteria provides that an article must be the growth, product, manufacture, or assembly of the BDC. In other words, the article must either be wholly the growth, product, or manufacture of a BDC, or it must have undergone a substantial transformation in the BDC so as to make it a product of the BDC. The second of the country of origin criteria provides that the sum of the cost or value of the materials produced in the BDC, plus the direct costs of processing operations performed in the BDC, must not be less than 35 percent of the appraised value of the imported article. Thus, if the first country of origin requirement is not met, then the article would not be eligible for GSP treatment even though the article satisfies the 35 percent requirement.

Section 10.177(a), Customs Regulations (19 CFR 10.177(a)), provides that the words "produced in the beneficiary developing country" refer to the constituent materials of which the eligible article is composed which are either (1) wholly the growth, product, or manufacture of the BDC, or (2) substantially transformed in the BDC into a new and different article of commerce. In the case of materials imported into a BDC, the cost or value of that material may be counted towards the 35 percent requirement only if the imported material is first substantially transformed into a new and different intermediate article of commerce which is then used in the BDC in the production of the final imported article.

In the present case, the wood frames are wholly the growth, product or manufacture of El Salvador. Therefore, the wood frames alone, without any glass or mirror added, clearly would satisfy both GSP country of origin criteria.

With regard to the frames with the glass or mirror inserted, we are assuming that the glass or mirror being cut is initially imported into El Salvador in the form of sheets which are then cut to shape

to fit into each individual frame size. Under these circumstances, the cutting of glass or mirror to size and shape and inserting it into the frame results in a substantial transformation of the glass or mirror imported into El Salvador so that the finished article would qualify as a product of El Salvador for purposes of the first country of origin criterion. The cost information you have provided indicates that the 35 percent requirement also would be met with respect to the frames with the glass or mirror insertion.

Holding:

On the basis of the information submitted, it is our opinion that the wood frames alone and the wood frames with the glass or mirror inserted would be entitled to duty-free treatment under the GSP.

(C.S.D. 89–25)

Restricted merchandise: Folding bait knife held to be a Balisong knife.

Date: October 31, 1988
File: RES-2-24 CO:R:C:V
731399 SO

MS. IRENE JANKOV
ACTING DEPUTY ASSISTANT REGIONAL COMMISSIONER
COMMERCIAL OPERATIONS DIVISION
PACIFIC REGION
P.O. Box 2071
Los Angeles, California 90053–3379

Re: Decision on Application for Further Review of Protest No. 2704–8–000799 of 2–22–88—K Mart Corporation Entry No. 0009618 of 12–10–87—Sportfisher Folding Bait Knife.

A shipment of 3,744 pieces of the Folding Bait Knives arrived at Los Angeles consigned to the K Mart Corporation. The folding knives were denied entry based on instructions contained in Headquarters TELEX of 2–13–87 which stated that, with the exception of certain knives which were the subject of a court decision referred to below, Customs will continue to administer the Switchblade Knife Act (15 U.S.C. 1241—1244) in the manner set forth in Headquarters ruling of July 3, 1986, to the Regional Counsel, Chicago. This ruling was circulated in a TELEX of 8–11–86, and held that "Butterfly" Knives are within the definition of a switchblade knife. The question to be decided in this protest is whether the sample Folding Bait Knife submitted for our consideration is a switchblade knife.

On June 6, 1988, the U.S. Court of Appeals for the Sixth Circuit decided the "Switchblade Knife" case of *Stewart A. Taylor, d/b/a/ Taylor Cutlery Mfg. Co.*, v. *U.S.A., et al*, No. CIV–2–85–199. The issue was whether certain Balisong knives (also known as butterfly or gravity knives), made in the Philippines and consigned to Mr. Taylor, were switchblade knives which are prohibited entry into the U.S. pursuant to the Switchblade Knife Act. An order of the district court which enjoined Customs from seizing future importations of these knives was reversed by the U.S. Court of Appeals.

The central issue in the *Taylor* case was whether the Balisong knives seized by Customs had a blade "which opens automatically * * * by operation of inertia, gravity or both," so as to fall within the definition of switchblade knives set forth in 15 U.S.C. 1241(b) and 19 CFR 12.95(a)(1). The Court found that the agency's action in barring Taylor's knives came about by reason of a permissable interpretation of the Customs regulations, which track in every essential the language of the statute. The Court stated that, "While it may also be reasonable to interpret the legislative history of the statute not to include these Balisong knives * * *, we cannot set aside the Customs Service's equally rational interpretation of the statute and its regulation issued thereunder." If the agency's interpretation is a reasonable one, the Court should give deference to it.

Furthermore, the Court stated that the position of the Customs Service in 1985 with regard to the seizure of Taylor's Balisong knives was not inconsistent with the Sept. 28, 1982, ruling which held that the Customs Service had examined many samples of the Balisong knives and was of the opinion that the Balisong design "of itself does not warrant automatic prohibition under the Switchblade Knife Act." The court pointed out that the ruling indicates that Balisong knives would be subjected to the same scrutiny as were all pocket knives to ensure that the importation did not violate the Switchblade Knife Act.

The Court's decision, in our opinion, affords Customs the opportunity to reassess its entire position with regard to the admissibility of all types of Balisong knives, switchblade knives, knife kits and knife handles imported without blades. Under the principle set forth in the *Taylor* case, the central issue in this case is whether the Folding Bait Knife has a blade "which opens automatically," and not whether it has a "blade style" which is designed for purposes that include a primary use as a weapon, noting that the Switchblade Knife Act makes no reference to any particular "blade style."

We are of the opinion that the sample Folding Bait Knife falls within the definition of a prohibited switchblade knife under to the Switchblade Knife Act. We do not accept the argument advanced by Counsel for the consignee that because the Folding Bait Knife in question is equipped with a metal clip which secures the folding handles in either the open or closed position, the knife does not open automatically by inertia, gravity or both. We have heard es-

sentially the same argument with regard to push button operated spring loaded switchblade knives equipped with safety catches which, unless released, prevent the push button from being pressed to release the blade.

Furthermore, the cases cited by counsel, in our opinion, have been overruled by the decision of the Court of Appeals for the Sixth Circuit in the *Taylor* case. We also disagree with the argument of counsel that the fact that previous shipments of Folding Bait Knives may have been released by Customs establishes a practice that would require publication of a notice of a change of practice in the *Federal Register*, offering an opportunity for public comment. However, we are planning to to publish a Notice of Proposed Rulemaking in the *Federal Register*, offering the public an opportunity to comment on an amendment to section 12.95(a) of the Customs Regulations (19 CFR 12.95(a)), which, among other things, would change the definition of prohibited switchblade knives to include all types of Balisong or "Butterfly" knives with folding handles.

Accordingly, the protest is denied. Interim instructions to Customs officers regarding our current position that all Balisong or "Butterfly" knives are prohibited importation by the Switchblade Knife Act and may be seized have been issued by TELEX on 9–29–88, copy enclosed. However, since Customs was not seizing Balisong knives at the time the shipment in question arrived in the United States, permission to export the Folding Bait Knives under Customs supervision may be granted without the formality of filing a petition for remission of seizure and forfeiture.

A copy of this decision may be furnished to all concerned parties.

(C.S.D. 89–26)

Valuation: The treatment of American made containers under the Tariff Schedules of the United States (TSUS) and under the Harmonized Tariff Schedule of the United States (HTSUS).

Date: November 18, 1988
File: CLA-2 CO:R:C:V
731806 MBH
xref 731420

MR. RICHARD G. SELEY
RUDOLPH MILES AND SONS
4950 Gateway East
P.O. Box 144
El Paso, Texas 79942

DEAR MR. SELEY:

This is in reference to a letter dated August 17, 1988, issued by the Customs Service in response to your letter of March 25, 1988, on behalf of your client, BRK Electronics, Division of Pittway Corp., Aurora Illinois, regarding the classification of rechargeable flashlights.

This letter is directed to the discussion in our previous ruling concerning the treatment of American packaging materials under the Tariff Schedules of the United States (TSUS), and under the Harmonized Tariff Schedule of the United States (HTSUS). As we stated, General Headnote 6(b)(i) of the TSUS provides that the usual or ordinary types of shipping or transportation containers are not subject to treatment as imported articles. Their value is, however, added to the dutiable value of the contents unless satisfactory proof is presented that the containers or holders are products of the United States which have been exported and then imported without being advanced in value or improved in condition while abroad. Thus under the TSUS, American containers which meet the requirements of the General Headnote are not subject to the payment of duties.

As our letter noted, General Headnote 6(b)(i), TSUS, was not carried over in the HTSUS. Moreover, under the HTSUS, General Rule of Interpretation (GRI) 5(b), packing containers entered with the goods shall be classified with the goods if they are of a kind normally used for the packing of such goods and if they are not clearly suitable for repetitive use. The letter concluded that under the HTSUS, the value of U.S. containers (if they are of the kind normally used for packaging their contents) will be added to the value of the products packaged in them for duty assessment purposes.

An important issue not addressed by our previous letter is the question whether American packaging materials would be eligible for duty-free treatment under subheading 9801.00.10, HTSUS. Subheading 9801.00.10, the successor provision to item 800.00, TSUS, provides duty-free treatment for "Products of the United States when returned after having been exported without having been advanced in value or improved in condition by any process of manufacture or other means while abroad."

Previous decisions by the Customs Service under the TSUS have not been entirely consistent in their rationale for the according of duty-free treatment to American packing containers. While most rulings have relied upon General Headnote 6(b)(i), TSUS, see, for example, Headquarters Ruling Letter 543086, dated October 19, 1983, others have cited item 800.00, TSUS, as the source of duty-free treatment. See Headquarters Ruling Letters 553042, dated July 19, 1984, and 543150, dated February 14, 1984. Moreover, section 10.3(c)(4), Customs Regulations, provides for duty-free treatment for "other articles of domestic manufacture which are in use at the time of importation as the usual coverings or containers of mer-

chandise not subject to an ad valorem rate of duty, which have not been advanced in value or improved in condition while abroad by a process of manufacture or other means."

In order to determine the proper classification of American packing containers under the HTSUS, one must, as for any imported merchandise, consult the GRIs. The GRIs begin with the following instructions:

Classification of goods in the tariff schedule shall be governed by the following principles:

> 1. The table of contents, alphabetical index, and titles of sections, chapters and sub-chapters are provided for ease of reference only; *for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions:* (Emphasis added).

The Explanatory Notes to the Harmonized System covering GRI 1 provide a clear explanation of its operation and importance. It states, "many goods are classified in the Nomenclature without recourse to any further consideration of the Interpretive Rules." The phrase "provided such headings or notes do not otherwise require" is "intended to make quite clear that the terms of the headings and any relative Section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification." See Explanatory Notes at page 1. It remains to determine whether the classification of American containers may be based on such headings and notes.

U.S. Note 1 to Chapter 98, HTSUS, covering special classification provisions states as follows:

> The provisions of this chapter are not subject to the rule of relative specificity in general rule of interpretation 3(a). *Any article which is described in any provision in this chapter is classifiable in said provision if the conditions and requirements thereof and any applicable regulations are met.* (Emphasis added).

U.S. Note 1 mandates that goods that are described in any of the Headings of Chapter 98 are classifiable therein, even when more specifically provided for elsewhere in the Nomenclature. It is clear that an American container which is exported and thereafter reimported with its contents is an article which is described in a provision of Chapter 98 within the meaning of U.S. Note 1 to Chapter 98. By the terms of that Note, therefore, if the American container meets the requirements of subheading 9801.00.10, HTSUS, it is classifiable therein. Accordingly, such containers would be classifiable under GRI 1 as the result of Note 1 to Chapter 98. Since the container is classifiable on the basis of GRI 1, we need not apply the remaining GRIs, in order to determine the classification of the container.

We believe that the foregoing analysis is sound from a policy perspective. We find no evidence that in enacting the HTSUS, Congress intended to alter the duty-free treatment previously accorded to American made containers under General Headnote 6(b)(i), TSUS. Accordingly, we conclude that the duty-free treatment provided by subheading 9801.00.10, HTSUS, extends to American containers provided that they meet all of the criteria for classification within that subheading. They must be products of the United States, returned after having been exported, without having been advanced in value or improved in condition while abroad. The act of being filled with its contents is not considered to constitute an advancement in the condition of the container. This is consistent with the practice under General Headnote 6(b)(i), TSUS, which likewise precludes an advancement in value or improvement in condition.

We hope that this letter clarifies the matter for you. We believe it is also responsive to the concerns expressed in your letter to us dated September 25, 1988. To the extent that our letter of August 17, 1988, is inconsistent with the foregoing, it is modified accordingly. If we may be of further assistance, please let us know.

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 132

PROPOSED CUSTOMS REGULATIONS REGARDING FILLING ABSOLUTE QUOTAS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend Part 132, Customs Regulations, to provide that importers may not transfer allotments from one port of entry to another for absolute quotas that fill at opening. This procedure, if adopted, will reduce the labor required by Customs in processing the absolute quota merchandise, expedite the release of the merchandise and provide more timely statistical information.

DATES: Comments must be received on or before April 4, 1989.

ADDRESS: Comments (preferably in triplicate) may be addressed to the Regulations and Disclosure Law Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2119, Washington, D.C. 20229 (202–566–8237).

FOR FURTHER INFORMATION CONTACT: Karen Cooper, Regulatory Trade Operations Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–8592).

SUPPLEMENTARY INFORMATION:

Background

The rules and procedures applicable to quotas administered by Customs are set forth in Part 132, Customs Regulations (19 CFR Part 132).

An import quota is a quantity control on imported merchandise for a certain period of time. Absolute or quantitative quotas are those which permit a limited number of units of specified merchandise to be entered into the U.S. or withdrawn from warehouse for consumption in the U.S. during specified periods. Once the quantity permitted under the quota is filled, no further entries or withdrawals, for consumption, of merchandise subject to quota are permitted.

Some absolute quotas limit the entry or withdrawal of merchandise from particular countries (geographic quotas) while others are global quotas and limit the entry or withdrawal of merchandise, not by source, but by total quantity.

Generally, absolute quotas are established by Presidential proclamations, Executive Orders and legislative enactments. Once an absolute quota is established, importers may qualify their merchandise for the quota by timely submitting an entry summary or withdrawal, for consumption, for the merchandise subject to the quota. Quota status is the standing which entitles quota-class merchandise to admission under an absolute quota. Quota priority is the precedence granted to one entry summary or withdrawal, for consumption, of quota-class merchandise over other entries or withdrawals of merchandise subject to the same quota. Quota priority and status are determined as of the time of presentation of the entry summary for consumption or withdrawal for consumption, in proper form, with the estimated duties attached.

Absolute quotas generally are filled in one of two ways. It is anticipated that some quotas will be filled at the opening of a quota period and certain procedures are followed in these instances. Different procedures are followed when a quota which has not filled upon its opening approaches getting filled. It should be noted that this document only concerns procedures regarding the filling of absolute quotas at opening.

Procedure for Quotas Anticipated To Be Filled at Opening

When it is anticipated that a quota will be filled at the opening of a quota period, entry summaries for consumption, or withdrawals for consumption, with estimated duties attached, may not be presented before 12 noon Eastern Standard Time in all time zones. Special arrangements are made so that all entry summaries for consumption, or withdrawals for consumption, for quota merchandise may be presented at the exact moment of the opening of the quota in all time zones. All importers prepared to present entry summaries for consumption, or withdrawals for consumption, when the quota opens are given equal opportunity to do so. All entry summaries for consumption, or withdrawals for consumption, presented in proper form are considered to have been presented simultaneously.

Quantities on all entry summaries for consumption, or withdrawals for consumption, considered to be submitted simultaneously, are prorated by Customs against the quota quantity admissible to determine the percentage to be allocated to each importer under the quota. The entry summaries for consumption or withdrawals for consumption are returned to the importers for adjustment. An adjusted entry summary for consumption, or withdrawal for consumption, with estimated duties attached, must be deposited within five working days after Customs authorizes release of the merchandise and the importer must take delivery of the merchandise within 15 days

after release is authorized. Otherwise, the entry summary or withdrawal, for consumption, will be rejected and quota status lost.

Merchandise imported in excess of an absolute quota may be held for the opening of the next quota period by entering it for warehouse, or it may be exported or destroyed under Customs supervision.

Transfer of Allotments

Presently, when an absolute quota fills at opening and Customs prorates the quota quantity, each importer is permitted to take his prorated amount from any combination of lines of entry summaries or withdrawals, for consumption, to be released in their entirety that he has presented which qualify for the quota. (Lines, in this context, refer to the actual lines on the relevent Custom forms.) The importer could choose to transfer his quota allotment and to have the merchandise released at any particular port of entry at which he had made proper presentation of the line of entry summary or withdrawals, for consumption. Any entry summary or withdrawal that the importer does not choose to include in meeting his prorated amount, or which exceeds it, could be warehoused for the next period.

This procedure is labor intensive, inefficient and not cost-effective for Customs. Furthermore, the transfer of allotments from one port to another slows down the release of merchandise and generates inconsistent statistical information.

Proposed Changes in Procedures

The Automated Commercial System (ACS), developed by Customs to enable Customs to process the rapidly increasing volume of commercial importations in an efficient and expeditious manner, is now capable of calculating quota closings and prorations. Use of the ACS for these purposes will reduce the labor required and will expedite the release of merchandise and the providing of timely statistical information. Before ACS can assume these functions, however, Customs must adopt a change in its absolute quota procedures. Accordingly, Customs is proposing to amend Part 132, Customs Regulations (19 CFR Part 132).

Regarding absolute quotas that fill at opening, it is proposed to amend § 132.12(c), Customs Regulations (19 CFR 132.12(c)), to state that an importer may combine merchandise from one entry summary for consumption or withdrawal for consumption with others within the same port to fill his quota allotment, but he may not transfer an allotment of quota from one port of entry to another.

Comments

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the

Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Room 2119, U.S. Customs Service Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Harold M. Singer, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 132

Customs duties and inspection, Entry, Imports.

PROPOSED AMENDMENTS

It is proposed to amend Part 132, Customs Regulations (19 CFR Part 132), as set forth below.

PART 132—QUOTAS

1. The authority citation for Part 132, Customs Regulations (19 CFR Part 132), continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General note 8, Harmonized Tariff Schedule of the United States), 1623, 1624.

2. It is proposed to revise the first paragraph of § 132.12(c)(2) to read as follows:

§ 132.12 Procedure on opening of potentially filled quotas.

* * * * * * *

(c) Proration of quantities * * *.

(2) In the event a quota is prorated, entry summaries for consumption, or withdrawals for consumption, with estimated duties attached, shall be returned to the importer for adjustment. Regard-

ing absolute quota, an importer may combine merchandise from one entry summary for consumption, or withdrawal for consumption, with others within the same port to fill his quota allotment, but he may not transfer an allotment from one port of entry to another. The time of presentation for quota purposes, when a quota is prorated, shall be the exact moment of the opening of the quota provided:

* * * * * * *

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: February 13, 1989.

SALVATORE R. MARTOCHE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, February 23, 1989 (54 FR 7781)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 88–1020)

SUPERIOR WIRE, PLAINTIFF-APPELLANT *v.* UNITED STATES, WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS, AND DISTRICT DIRECTOR OF CUSTOMS AT PORT OF DETROIT, MICHIGAN, DEFENDANTS-APPELLEES

Richard A. Kulics, of Birmingham, Michigan, argued for plaintiff-appellant.

John J. Mahon, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendants-appellees. With him on the brief were *John R. Bolton*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office.

Charles Owen Verrill, Jr., Wiley, Rein & Fielding, of Washington, D.C., argued for Amicus Curiae Raritan River Steel. With him on the brief was *Lynn S. West*.

Appealed from: U.S. Court of International Trade.

Judge RESTANI.

(Decided February 15, 1989)

Before NIES, BISSELL and ARCHER, *Circuit Judges*.

ARCHER, *Circuit Judge*.

Superior Wire (Superior) appeals the judgment of the United States Court of International Trade, 669 F. Supp. 472 (Ct. Int'l Trade 1987), that wire drawn in Canada from Spanish wire rod is not "substantially transformed" for purposes of determining the country of origin under a Voluntary Restraint Agreement between the United States and Spain. We affirm.

I

Superior began importing wire rod from Spain into Canada in 1984 following the imposition of preliminary anti-dumping and countervailing duties on wire rod imported from Spain into the United States. In a newly-established wire drawing facility in Canada, Superior drew the wire rod into wire before shipping the wire to its wire mesh operation in Michigan. It claimed Canada as the country of origin instead of Spain.

Superior's practice continued when, pursuant to the Steel Import Stabilization Act of 1984, Pub. L. No. 98–573, 98 Stat. 2948 (1984), *reprinted in* 19 U.S.C. § 2253 note (1982 & Supp. IV 1986), the Unit-

ed States entered into a Voluntary Restraint Agreement (VRA) with Spain covering wire and wire rod. While these products were no longer subject to duties, they were limited by quotas and could not enter the United States without validated export licenses. In March 1987, the Customs Service issued Ruling 075923 JLV, which determined that the drawing of wire from wire rod does not constitute a substantial transformation. Based on this ruling, Superior's imports of drawn wire from Canada were classified as being of Spanish origin.

The Court of International Trade held that Ruling 075923 JLV did not represent a change of "position" on the part of the Customs Service that necessitated publication in the Federal Register and opportunity for public comment. *See* 19 C.F.R. § 177.10(c)(2) (1988). This issue arose because Superior claimed reliance on a ruling letter issued in 1984, Ruling 553052 CW, to a third party, which was available to the public on microfiche but not published in the Customs Bulletin. In that ruling, the Customs Service held that tengauge wire drawn in Mexico from wire rod made in the United States would be considered a "substantially transformed constituent material" of concrete reinforcing wire mesh exported to the United States. The ruling permitted the cost or value of the transformed product to be included as part of the Mexican material or processing costs in determining whether or not less than thirty-five percent of the appraised value of the imported article (concrete wire mesh) is attributable to a designated beneficiary country (Mexico) and therefore entitled to duty-free entry under the Generalized System of Preferences (GSP). *See* 19 U.S.C. §§ 2461–2465 (1982 & Supp. IV 1986); 19 C.F.R. § 10.176 (1988). Superior also claimed reliance based on the fact that Customs Service officials had followed Ruling 553052 CW in permitting Superior's Canadian drawn wire to enter the United States as a Canadian product until Ruling 075923 JVL issued.

The Court of International Trade further determined on the merits that the drawing of wire rod into wire does not substantially transform wire rod into a new product for the purpose of determining the country of origin under the VRA.[1] 669 F. Supp. at 480.

II

The trial court's findings of fact are reviewed under the clearly erroneous standard of review. *Daw Indus., Inc.* v. *United States,* 714 F.2d 1140, 1142, 1 Fed. Cir. (T) 146, 148 (Fed. Cir. 1983). Findings of fact may be overturned only when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 395 (1948). The court is not so restricted with respect to legal conclusions and will reverse those conclusions found

[1] Judge Restani initially ruled in favor of Superior, but after a second hearing deemed necessary to consider "the number of undeveloped relevant facts and * * * numerous inconsistencies in the facts presented," she vacated the initial opinion and judgment.

to be in error. *Heisig* v. *United States*, 719 F.2d 1153, 1158 (Fed. Cir. 1983).

III

Preliminarily we must determine whether Superior was entitled to rely on the 1984 ruling letter, and the Customs Service's admittance of its wire imports, as a "position" of the Customs Service which could be changed only after notice in the Federal Register and public comment, or whether the Court of International Trade correctly determined that the Customs Service did not change a prior "position" in issuing Ruling 075923 JLV.

Customs Service regulation 19 C.F.R. § 177.9 (1988) provides in subparagraph (a) that a ruling letter represents the official position of the Customs Service "with respect to the particular transaction or issue described therein." Subparagraph (c) of section 177.9 expressly states, however, that a ruling letter should not be relied on by other persons and they should not "assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter." These regulations circumscribe the applicability of a ruling letter and preclude a person other than the recipient from claiming reliance on such a ruling with respect to other transactions. Further, a ruling letter may be modified or revoked if later determined to be erroneous and, except for the person to whom the ruling was addressed, the regulations do not require that notice be given of a revocation or change. 19 C.F.R. § 177.9(c) (1988).

Superior argues that Ruling 553052 CW had become a "position" of the Customs Service within the meaning of 19 C.F.R. § 177.10 (1988) because it was available to the public on microfiche and was followed by Customs Service officials in permitting entry of its Canadian drawn wire. That regulation provides generally that any precedential decision of the Customs Service shall be published in the Customs Bulletin or otherwise made available for public inspection and that a precedential decision includes a ruling letter. Section 177.10(a) reads as follows:

> (a) *Generally.* Within 120 days after issuing any precedential decision under the Tariff Act of 1930, as amended, relating to any Customs transaction (prospective, current, or completed), the Customs Service shall publish the decision in the Customs Bulletin or otherwise make it available for public inspection. For purposes of this paragraph a precedential decision includes any ruling letter, internal advice memorandum, or protest review decision.

Section 177.10 also requires in subparagraph (c)(2) that:

> (c)(2) Before the publication of a ruling which has the effect of changing a position of the Customs Service and which results in a restriction or prohibition, notice that the position (or prior ruling on which the position is based) is under review will be

published in the Federal Register and interested parties given an opportunity to make written submissions with respect to the correctness of the contemplated change.

The Court of International Trade held that ruling letter 553052 CW had not evolved into a position of the Customs Service. 669 F. Supp. at 476. The court considered its prior decisions in *National Juice Prods. Ass'n* v. *United States,* 628 F. Supp. 978 (Ct. Int'l Trade 1986), and *Arbor Foods, Inc.* v. *United States,* 607 F. Supp. 1474 (Ct. Int'l Trade 1985). In its opinion, the court noted that *National Juice* found that a "position" did exist based on the existence of several rulings published in the Customs Bulletin that "provided a factually explicit description of a Customs position of at least eight years standing." 669 F. Supp. at 476. It further noted that *Arbor Foods* reached the opposite result where "a series of ruling letters, oral assurances from various Customs officials, and remissions of liquidated damages claims" were held not to constitute a Customs position. *Id.* (quoting *Arbor Foods,* 607 F. Supp. at 1478). The court concluded that one ruling letter, which described a wiremaking process in Mexico constituting part of the process of manufacturing concrete wire mesh for importation into the United States and which was issued for purposes of the thirty-five percent requirement under the Generalized System of Preferences, was more like the fact pattern in *Arbor Foods* than the one described in *National Juice. Id.* On this basis, it held that the letter ruling could not be viewed as a Customs Service position. *Id.*

We are convinced that the Court of International Trade correctly held that letter ruling 553052 CW did not represent a position of the Customs Service. The applicable regulations discussed above are not a model of clarity. It is apparent, however, from the language of 19 C.F.R. § 177.9 that ruling letters are not issued by the Customs Service with the expectation that they can generally be relied upon. Rather, they are intended to apply to a specific set of circumstances. If the Customs Service determines that a specific ruling letter is to have broader applicability, then, as provided by 19 C.F.R. § 177.10, it will ordinarily be published in the Customs Bulletin. As the trial court noted, publication in the Customs Bulletin is important in determining whether the Customs Service has established a position. *See National Juice Prods. Ass'n,* 628 F. Supp. at 993–94.

Superior contends that because Ruling 553052 CW was available to the public on microfiche, it was a "published" decision and therefore should be treated as a position of the Customs Service. The ruling was available on microfiche in accordance with Customs regulations, see 19 C.F.R. § 103.0 (1988), *et seq.,* and the Freedom of Information Act, 5 U.S.C. § 552 (1982 & Supp. IV 1986). The accessibility of rulings in this manner cannot be regarded as having the same effect as publication in the official publication of the Customs Service. The Customs regulations do not provide for the inclusion of all letter rulings in the Bulletin, only those of precedential value, *see* 19

C.F.R. § 177.10(a) (1988). Moreover, the regulations explicitly provide that ruling letters are not to be generally relied on. 19 C.F.R. § 177.9(c) (1988).

The trial court also appropriately noted that Superior had the option of obtaining its own letter ruling, which would have given it the right to notice before a change. Superior did not choose this approach, but instead relied on a ruling involving different circumstances and different statutory provisions. The 1984 ruling was issued in the context of the GSP, which this court, in *Torrington Co.* v. *United States*, 764 F.2d 1563, 1571, 3 Fed. Cir. (T) 158, 167 (Fed. Cir. 1985), recognized was enacted for the "fundamental purpose of fostering industrialization" in beneficiary developing countries. Here, however, the VRA was intended to preclude the entry into the United States of wire and wire rod products from Spain that do not have proper export licenses. Moreover, the product being imported in the 1984 ruling on which Superior relies here was a different product, i.e., finished concrete wire mesh, and the issue was different, i.e., what portion of the value of that product should be treated under the GSP regulations of the Customs Service as of Mexican manufacture. In this case, the import was the intermediate product wire.

With respect to Superior's contention that it should be entitled to rely on the oral advice it received from Customs officials who, in turn, apparently followed Ruling 553052 CW in allowing Superior's wire to be imported until the issuance of Ruling 075923 JLV, the Court of International Trade correctly held that such advice and acquiescence cannot establish a Customs Service position, which would require notice and opportunity for public comment to be changed. *See Arbor Foods, Inc.*, 607 F. Supp. at 1478.

IV

On the country of origin issue, Superior contends that the wire imported into the United States is a product of Canada, not Spain, because the Spanish wire rod was "substantially transformed" in Canada. Substantial transformation requires that "[t]here must be transformation; a new and different article must emerge, 'having a distinctive name, character, or use.'" *Anheuser-Busch Brewing Ass'n* v. *United States*, 207 U.S. 556, 562 (1908) (quoting *Hartranft* v. *Wiegmann*, 121 U.S,. 609, 615 (1887)); *accord Torrington Co.*, 764 F.2d at 1568, 3 Fed. Cir. (T) at 163. Whether such a transformation occurred involves findings of fact by the trial court. These findings may not be set aside unless clearly erroneous. "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently * * *. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573–74 (1985).

The Court of International Trade considered the "transformation of wire rod to wire to be minor rather than substantial." 669 F. Supp. at 480. The court found that there was no significant change in use or character, but there was a change in name, *see Anheuser-Busch Brewing Ass'n*, 207 U.S. at 562, and concluded that "wire rod and wire may be viewed as different stages of the same product." 669 F. Supp. at 479.

Although noting that "[t]he wire emerges stronger and rounder after" drawing the wire rod, the court found "[i]ts strength characteristic * * * is * * * metallurgically predetermined * * * through the fabrication of the wire rod." 669 F. Supp. at 480. The court explained that "[t]he chemical content of the rod and the cooling processes used in its manufacture * * * determine the properties that the wire will have after drawing." 669 F. Supp. at 474. These findings are "plausible" in light of the record viewed in its entirety and are not clearly erroneous. *See Anderson*, 470 U.S. at 573–74. There was evidence of record to show that the rod producer determines the tensile strength of the drawn wire by the chemistry of the steel, particularly by the mix of carbon and manganese in the molten steel rods, and that the properties desired in the drawn wire dictate the selection of scrap grade.

We are not persuaded by Superior's argument that because wire is "cleaner, smoother * * * and cross-sectionally more uniform" than the wire rod it has a different character. Such changes appear to be primarily cosmetic in the light of the predetermined qualities and specifications of the wire rod. *See United States* v. *Murray*, 621 F.2d 1163 (1st Cir.), *cert. denied*, 449 U.S. 837 (1980).

There was also ample evidence from which the Court of International Trade could determine that there is no change in use between the wire rod and the wire. The end use of wire rod is generally known before the rolling stage and the specifications are frequently determined by reference to the end product for which the drawn wire will be used. Thus, rod used for the production of concrete reinforcing mesh is known as "mesh-grade" or "mesh-quality rod." Moreover, the evidence indicates that if the rod is produced improperly for its intended application, the wire drawing process is incapable of making the product suitable for such use.

With respect to the third of the *Anheuser-Busch* factors, the trial court noted that the two products have different names: wire and wire rod. This is the least persuasive factor and is insufficient by itself to support a holding that there is a substantial transformation. *See United States* v. *International Paint Co.*, 35 CCPA 87, 93–94 (1948) ("a change of name alone would not necessarily result in a product being regarded as 'manufactured or produced' "); *National Juice Prods. Ass'n*, 628 F. Supp. at 989.

The Court of International Trade also cited a number of other considerations influencing its decision that a substantial transformation had not occurred in the drawing process, including the fact

that there was "no transformation from producers' to consumers' goods * * * no complicated or expensive processing," and "only relatively small value * * * added." 669 F. Supp. at 480.[2]

In view of the court's findings and conclusions, we are convinced of the correctness of its decision. The drawing of wire rod into wire is, as the Court of International Trade concluded, not the manufacture of a new and different product as required by *Anheuser-Busch Brewing Ass'n*, 207 U.S. at 562. Accordingly, Superior's wire products imported via Canada required valid export licenses under the VRA with Spain.

The judgment of the Court of International Trade is

AFFIRMED.

RULES OF THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT TO BE AMENDED; NOTICE

The United States Court of Appeals for the Federal Circuit will amend its rules. These changes are the first requiring public notice and comment under the Rules Enabling Act as amended by the Judicial Improvements and Access to Justice Act (Pub. L. No. 100–702).

Rules governing the contents of motions, briefs and appendices will contain new provisions. More time will be allowed for filing the appendix. Parties in appeals under 28 U.S.C. 1295 (a)(1) will be required to discuss settlement. Some appeals will now be decided with reference to a particular rule. Additional guidance is given to counsel considering Suggestions for Rehearing In Banc, to help them avoid the filing of frivolous Suggestions with the resultant imposition of sanctions.

Copies of the proposed changes to the Federal Circuit Rules are available from the Clerk, U.S. Court of Appeals for the Federal Circuit, National Courts Building, 717 Madison Place, NW., Washington, DC 20439. Comments on the rules may be sent to the Clerk. The comment period will end on March 15, 1989.

Dated: February 21, 1989.

[2]Amicus urges that the purposes of the VRA program are relevant to the decision on country of origin. The trial court did not rely on this factor, and we find it unnecessary to do so to affirm. Our decision should, therefore, not be understood to entirely rule out consideration of the context in which a country of origin determination must be made.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 89–14)

SMITH CORONA CORP. PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND BROTHER INDUSTRIES, LTD., BROTHER INTERNATIONAL CORP., NAKAJIMA ALL CO., LTD., CANON INC., CANON U.S.A., INC., SILVER SEIKO, LTD., SILVER REED AMERICA, INC., MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., KYUSHU MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. AND PANASONIC CO. AND PANASONIC INDUSTRIAL CO., DIVISIONS OF MATSUSHITA ELECTRIC CORP. OF AMERICA, INTERVENOR-DEFENDANTS

Consolidated Court No. 87–02–00157

MEMORANDUM AND ORDER

[Plaintiff's motion for entry of final judgment granted; suspension of liquidation based on the judgment denied.]

(Dated February 3, 1989)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.* and *John M. Breen*) for the plaintiff.

John R. Bolton, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*); and Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Jean Heilman Grier*) for the defendant.

Tanaka Ritger & Middleton (*H. William Tanaka* and *Patrick F. O'Leary*) for intervenor-defendants Brother Industries, Ltd. and Brother International Corp.

McDermott, Will & Emery (*R. Sarah Compton* and *Patrick J. Cumberland*) for intervenor-defendant Nakajima All Co., Ltd.

Covington & Burling (*Harvey M. Applebaum* and *David R. Grace*) for intervenor-defendants Canon Inc. and Canon U.S.A., Inc.

Willkie Farr & Gallagher (*Christopher A. Dunn* and *Zygmunt Jablonski*) for intervenor-defendants Silver Seiko, Ltd. and Silver Reed America, Inc.

Weil, Gotshal & Manges (*Stuart M. Rosen* and *Karin M. Burke*) for intervenor-defendants Matsushita Electric Industrial Co., Ltd., Kyushu Matsushita Electric Industrial Co., Ltd. and Panasonic Company and Panasonic Industrial Company, Divisions of Matsushita Electric Corporation of America.

AQUILINO, *Judge:* In the light of the court's slip op. 88–127, 12 CIT ——, 698 F.Supp. 240 (Sept. 20, 1988), the International Trade Administration, U.S. Department of Commerce ("ITA") has determined that portable electric typewriters incorporating text memories are within the scope of a May 1980 antidumping-duty order *sub nom. Final Results of Revised Scope Determination for Antidump-*

ing Duty Order on Portable Electric Typewriters from Japan Pursuant to Court Remand (Nov. 23, 1988). The ITA further states therein:

> Since we are not changing, but only clarifying, the scope of the antidumping order, our decision must apply to all unliquidated entries of portable electric typewriters incorporating text memory and portable electric typewriters incorporating a calculating mechanism. When the judicial review of * * * *Final Results of Antidumping Duty Administrative Review,* 52 Fed. Reg. 1504 (Jan. 14, 1987) has been completed and the Department's determinations are finally affirmed by the courts, we will publish our redetermination in the *Federal Register*, and order Customs to suspend liquidation of all entries of such merchandise.

In other words, while determining that portable electric typewriters which possess either a calculator or text memory are within the ambit of the 1980 order, "until the appellate court rules, there will be no suspension of liquidation", to quote from page 8 of Defendant's Memorandum in Partial Opposition to Motion of Smith Corona for Final Judgment, Remanding the Action for Suspension of Liquidation, or, in the Alternative, for Preliminary Injunction. The appellate court referred to is the U.S. Court of Appeals for the Federal Circuit, to which any appeals from this court, of course, lie. As the lengthy title of defendant's memorandum indicates, the plaintiff has interposed a motion for entry of final judgment and for remand for administrative suspension of liquidation or, in the alternative, for an injunction to the same end. The motion necessitates brief recapitulation of the proceedings to date in this case.

I

Plaintiff's amended complaint contains ten counts, the first seven of which are directed at the administrative review conducted by the ITA pursuant to 19 U.S.C. § 1675 of imports of Brother and Silver Seiko portable electric typewriters ("PETs") for the period May 1, 1981 through April 30, 1982. The remaining counts deal with the scope of the underlying antidumping-duty order. They were "bifurcated" upon consent of the parties for judicial review and resolution first.

The plaintiff made a motion for judgment on the agency record on those three counts. The defendant responded with a concession that "its determination that PETs incorporating calculators or text memory were specifically excluded from the original investigation and order is not supported by substantial evidence in the administrative record."[1] The intervenor-defendants took the position that substantial evidence did in fact exist in support of the agency's determination. After careful review of the record at their insistence, however, the court was unable to discern such evidence, whereupon

[1]Defendant's Response to Plaintiff's Motion for Judgment on the Agency Record, p. 5 (Sept. 14, 1987).

the scope issues were remanded to the ITA for reconsideration per slip op. 87–145, 11 CIT ——, 678 F.Supp. 285 (1987).

Following further proceedings, the ITA issued its *Final Results of Revised Scope Determination for Antidumping Duty Order on Portable Electric Typewriters from Japan Pursuant to Court Remand* (March 18, 1988), wherein it concluded that PETs with calculators were covered by the original order but that those with text memories were not. The Brother intervenor-defendants contested the first conclusion, while the plaintiff complained about the other.

Review of the entire, voluminous record compiled below led the court to conclude (in slip op. 88–127) that

> the determination of the ITA after remand that portable electric typewriters incorporating calculators are within the scope of the *Antidumping Duty Order on Portable Electric Typewriters from Japan*, 45 Fed.Reg. 30,618 (May 8, 1980), is supported by substantial evidence on the record and is in accordance with law, but the determination of the agency after remand that portable electric typewriters with text memories are not within the scope of the aforesaid antidumping-duty order is not supported by substantial evidence on the record, and that determination is therefore * * * reversed * * *. 12 CIT at ——, 698 F.Supp. at 254.

The ITA was directed to issue a redetermination that PETs with text memories are within the 1980 order's scope, but before it complied (on November 23, 1988) with the court's interlocutory order, three intervenor-defendants had noticed what have been characterized as "protective" appeals.[2]

As for the defendant, its counsel recommend in their present memorandum (page 8) "that no appeal of the * * * issue (concerning PETs with text memory) be prosecuted", while the plaintiff has served and filed along with its motion for final judgment a "Notice of Abandonment of Claims" on the remaining, unresolved seven counts of its amended complaint.

II

The defendant consents to entry of final judgment. All the intervenor-defendants save Brother Industries, Ltd. and Brother International Corporation state that they "do not oppose [plaintiff]'s apparent goal, that is dismissal of counts 1 through 7, but submit that [it]s Notice is improper".[3] They also claim uncertainty as to whether slip op. 88–127 was a final judgment, expressing the view that, if it was, the timely filing of the notices of appeal (on behalf of the three intervenor-defendants) has divested the court of jurisdiction. The point is pressed more directly in papers filed on behalf of Brother.

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[2]The plaintiff indicates that it has moved to dismiss the appeals bearing Federal Circuit docket numbers 89–1140 and 89–1141 for failure to meet the test of finality for purpose of appeal.

[3]Intervenor-Defendants' Memorandum in Opposition to Plaintiff Smith Corona Corporation's Motion for Final Judgment, Remanding the Action for Suspension of Liquidation, or, in the Alternative, for Preliminary Injunction and a Notice of Abandonment of Claims, p. 7.

To be sure, timely appeal of a final decision of the Court of International Trade within the meaning 28 U.S.C. § 1295 (a)(5) or of an interlocutory decision of the Court pursuant to 28 U.S.C. § 1292(d) can divest it of jurisdiction, but neither avenue has been traveled to date here. While the parties agreed to resolution of the scope issues first, none sought till now entry of an appealable order of the kind contemplated by CIT Rule 54(b), which bears recitation, to wit:

> *Judgment Upon Multiple Claims or Involving Multiple Parties.* When more than one claim for relief is presented in an action, * * * or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is not just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

And no party has sought certification of the court's September 20, 1988 interlocutory order for appeal to the Federal Circuit pursuant to 28 U.S.C. § 1292(d)(1).

Be that as it may, the plaintiff now seeks entry of judgment—in the stated hope of full government compliance with the results thus far, and with dismissal of its other pleaded causes of action. Since in this court's view no judgment or other appealable order has yet entered[4], it has jurisdiction to fashion such a decree. *Cf. Fundicao Tupy S.A.* v. *United States*, 841 F.2d 1101 (Fed.Cir. 1988).

The intervenor-defendants are correct, however, in questioning plaintiff's proposed "abandonment" of its unresolved claims in pursuit of a judgment. CIT Rule 41(a) provides that, once issue has been joined, voluntary dismissal is effectuated only through filing of a stipulation thereof, signed by all parties who have appeared in the action, or by order of the court, viz.,

> * * * [A]n action shall not be dismissed by the plaintiff unless upon order of the court, and upon such terms and conditions as the court deems proper.

Suffice it to state here that the court deems plaintiff's present motion to be one made, in pertinent part, pursuant to this provision of Rule 41(a)(2) notwithstanding a strained attempt at pages 9–12 of plaintiff's reply memorandum to duck this rule—in an action where

[4]Proceedings of the kind that are this case are complex, and the concept of finality has been characterized as "alithery, tricky." *United States* v. *243.22 Acres of Land in Town of Babylon*, 129 F.2d 678, 680 (2d Cir. 1942), *cert. denied sub nom. Lambert* v. *United States*, 317 U.S. 698 (1943). The responses to its motion for final judgment etc. have ostensibly caused the plaintiff to submit a further Motion for Leave to File Response in the apparent belief that its main one is not "dispositive" within the meaning of CIT Rule 7(d), which permits a reply in support of such a motion as a matter of right. While the court does not share such a belief in view of Rule 7(g) and the precise nature of the relief requested, if it did, the motion for leave to file would be granted—as well-grounded. That is, plaintiff's Response to Memoranda in Opposition to Suspension of Liquidation is received, and will be considered by the court.

it was the primary proponent of severance of its seven alleged causes of action. In any event, the court concludes that grant of dismissal of them would clearly be in the interests of a just and efficient termination of this litigation.

III

As indicated above, the defendant equates termination, at least in this case, with issuance of a mandate by the circuit court of appeals. While the final remand results state that the ITA's "decision must apply to all unliquidated entries of portable electric typewriters incorporating text memory and portable electric typewriters incorporating a calculating mechanism", the agency is apparently unwilling to ordain a suspension of liquidation pending any judicial review at the next, appellate level.

Defendant's stance is premised exclusively in this regard on *Melamine Chemicals, Inc.* v. *United States*, 732 F.2d 924 (Fed.Cir. 1984). In that case, the ITA appealed a CIT remand of a final negative determination of dumping. The court of appeals vacated and reversed the interlocutory remand order and also opined that the

> administrative handling of the involved entries * * * can be effected only by (1) a preliminary injunction pursuant to 19 U.S.C. § 1516a(c)(2), or (2) a *final* court decision adjudicating the legality, *vel non*, of the challenged determination. 19 U.S.C. § 1516(a)(e).[5]

Of course, subsequent decisions like *Badger-Powhatan, A Division of Figgie International, Inc.* v. *United States*, 808 F.2d 823 (Fed.Cir. 1986), and *Cabot Corporation* v. *United States*, 788 F.2d 1539 (Fed.Cir. 1986), indicate that a remand order is not a final one. But this does not mean that a party before this court is at liberty to ignore such an order, whether or not subject to further judicial review.

Obviously, plaintiff's goal in abandoning its remaining, pleaded claims and praying for a final judgment is not to facilitate any appeal, rather to obtain a final court decision adjudicating the legality, *vel non*, of the challenged determination. That the judgment which will enter in conjunction with this memorandum is such a decision is clear to this court.[6] Also clear is that the court may fashion the judgment in such a manner as to assure its enforcement. But no judgment can extend further than justice requires, and justice does not obligate the ITA to direct the Customs Service now to suspend liquidation under the guise of this case. To repeat slip op. 87–145 in this regard:

> * * * [T]he provision for imposition of antidumping duties if the administering authority determines that a class or kind of foreign merchandise is being sold in the United States at less than fair value, 19 U.S.C. § 1673 (1984), is silent on the subject of sus-

[5] 732 F.2d at 934 (emphasis in original, footnote omitted).
[6] Counsel for the defendant intimate that further judicial review will not be sought on behalf of the ITA.

> pension of liquidation. Rather, under the statute now in effect suspension is mandated after either a preliminary or a final affirmative determination of the ITA of sales at less than fair value of the merchandise which is the subject of its investigation. *See* 19 U.S.C. § 1673b(d) and § 1673d(c)(1)(B). Neither such affirmative determination as to the typewriters in question has been made by the administrating authority. 11 CIT at ——, 678 F.Supp. at 293.

Indeed, the plaintiff may have lost sight of the fact that the investigation which is the foundation of this case focused on PETs imported during the period May 1, 1981 through April 30, 1982, a time when the record shows that the typewriters covered by the scope issues did not exist—and therefore could hardly have been subject to liquidation after entry then.

IV

As an alternative approach, the plaintiff has applied for an injunction. The defendant does not oppose suspension of liquidation via this route, but the intervenor-defendants do.

This is plaintiff's second attempt at the same relief. At the outset of the case, it presented evidence and legal argument in open court. That presentation led the court to find the requisite likelihood of success on the merits of the scope issues, as discussed at length in slip op. 87–145, familiarity with which is presumed herein. In fact, the results on remand have confirmed the correctness of plaintiff's position.

This and other courts have held that the showing of such likelihood is in inverse proportion to the severity of the injury the moving party will sustain without injunctive relief, but the court is unable to hold that success on the merits entirely dispels positive showings of irreparable harm, a balance of hardship in favor of the relief, or of advancement of the public interest through grant of an injunction. The plaintiff did not meet these three requirements the last time, and its presentation is even less persuasive now. For example, the totality of its stated position on direct harm is as follows:

> B. *Irreparable Injury*
>
> Given that every imported portable typewriter that is liquidated will escape the antidumping duty order, each such entry is by definition irreparable. Even if the injury of each additional typewriter itself is small, that this condition has persisted another year and that Smith Corona apparently will continue to suffer in the marketplace from the presence of imports that unfairly circumvent the antidumping duty order is surely grounds for injunctive relief.[7]

Moreover, the plaintiff opposes a motion by intervenor-defendants for oral argument on its present application for an injunction.

[7] Plaintiff's Memorandum of Points and Authorities, p. 12.

If there is nothing more to be said by the plaintiff, the court is left with little alternative but to deny its application (thereby obviating any need to grant intervenor-defendants' motion to be heard beyond their papers already on file).

As commenced, this case covered (in counts 1–7) imports of Brother and Silver Seiko PETs for the period May 1, 1981 through April 30, 1982. At plaintiff's request, the court enjoined liquidation of those entries—over the opposition of Brother but not of either the defendant or Silver Seiko. That relief was granted essentially on the basis of *Zenith Radio Corporation* v. *United States,* 710 F.2d 806, 810 (Fed.Cir. 1983), wherein the court concluded

> that liquidation would * * * eliminate the only remedy available to Zenith for an incorrect review determination by depriving the trial court of the ability to assess dumping duties on Zenith's competitors in accordance with a correct margin on entries in the '79–'80 review period. The result of liquidating the '79–'80 entries would not be economic only. In this case, Zenith's statutory right to obtain judicial review of the determination would be without meaning for the only entries permanently affected by that determination. In the context of Congressional intent in passing the Trade Agreements Act of 1979 and the existing finding of injury to the industry underlying T.D. 71–76, we conclude that the consequences of liquidation do constitute irreparable injury.

Now that the plaintiff is abandoning its claim regarding the Brother and Silver Seiko PET entries for 1980–81, the injunction suspending their liquidation can be vacated. The point that remains valid, however, is that suspension was necessary to preserve the efficacy of any judicial relief as to them, at least from plaintiff's perspective. No doubt this is why the defendant did not oppose suspension at the time and also why it does not now oppose an injunction in the recently-filed, subsequent action *Smith Corona Corporation* v. *United States,* CIT No. 88–11–00866, which complains about the results of the ITA's administrative review of imports of PETs from Japan for periods April or May 1982 through April 1986 and May 1985 through April 1986. During those periods, PETs with text memories or calculators were imported and may be subjected to ITA review. *See Portable Electric Typewriters from Japan Final Results of Antidumping Duty Administrative Review,* 53 Fed.Reg. 40,926, 40,927 (Oct. 19, 1988).

Be that matter as it may, the plaintiff in this one is entitled to final judgment on the causes of action which have been resolved, but it is not entitled to suspension of liquidation[8] based on that judgment. Hence, that part of plaintiff's motion which seeks entry of a final judgment is hereby granted; the remainder of the motion is de-

[8]On the other hand, the facts and circumstances of the subsequent action, namely, No. 88–11–00866, when viewed in the light of *Zenith Radio Corporation* v. *United States,* 710 F.2d 806 (Fed. Cir. 1983), indicate that entry of a preliminary injunction, suspending liquidation is appropriate, and this court will therefore grant such relief in that action in the manner requested by the plaintiff and not opposed by the defendant.

nied, and any interlocutory matters remaining in this case are deemed decided in accordance with this memorandum.

SO ORDERED.

(Slip Op. 89–15)

CHINSUNG INDUS. CO., LTD.; DONAM INDUS. CO., LTD.; DONG IN INDUS. CO., LTD; DONG WON STATIONERY CO., LTD.; EUNJIN INDUS. CO., LTD.; EUNJIN INT'L CORP.; AND KEYWON, INC., PLAINTIFFS *v.* UNITED STATES AND THE U.S. INTERNATIONAL TRADE ADMINISTRATION OF THE U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND SPM MANUFACTURING CORP.; THE HOLSON CO.; AND KLEER-VU PLASTICS CORP., DEFENDANT-INTERVENORS

Court No. 86–01–00059

Before CARMAN, *Judge.*

[Plaintiffs' motion for judgment upon agency record denied; complaint dismissed.]

(Decided February 7, 1989)

Finley, Kunble, Wagner, Heine, Underberg, Manley, Myerson & Casey, (Michael J. Calhoun, Alexander P. Haig and *Sheila A. Kraft)* for plaintiffs Chinsung Indus. Co., Ltd., Donam Indus. Co., Ltd., Dong In Indus. Co., Ltd., Dong Won Stationery Co., Ltd., Eunjin Indus. Co., Ltd., Eunjin Int'l Corp., and Keywon, Inc.

John R. Bolton, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *(Sheila N. Ziff); John D. McInerney,* of Counsel, Department of Commerce, for defendants.

Willkie, Farr & Gallagher (William H. Barringer and *James P. Durling); Wald, Harkrader & Ross, (Mark Schattner* and *Marilyn E. Kerst),* for defendant-intervenors SPM Manufacturing Corp., The Holson Co., and Kleer-Vu Plastics Corp.

OPINION AND ORDER

CARMAN, *Judge:* Plaintiffs move pursuant to Rule 56.1 of the Rules of this Court for judgment upon the agency record seeking a remand to the United States Department of Commerce, International Trade Administration (ITA or Commerce) for an order requiring the ITA to recalculate the less-than-fair value margin in this case on a company by company basis; requiring Commerce to use data reported by the staff of the ITA in their respective verification reports either as verified data pursuant to section 776(a) of the Tariff Act of 1930 (the Act), as amended, 19 U.S.C. § 1677e(a) (1982 & Supp. 1986) as the best information available pursuant to sections 776(a) of the Act, as amended, 19 U.S.C. § 1677e(a), as the best information otherwise available pursuant to section 776(b) of the Act, as amended, 19 U.S.C. § 1677e(b) or a combination of these methods; and further requiring the ITA to use data developed regarding other plaintiff companies to recalculate less-than-fair value margins for plaintiff Dong Won Stationery Co., Ltd.

Issues

The questions presented by this case are (A) whether the determination by Commerce that all the data submitted by the plaintiffs was unverified or unverifiable, was supported by substantial evidence on the record or in accordance with law; and, if so, (B) whether the determination by Commerce that information provided by petitioners at the administrative level constitutes the best information available pursuant to 19 U.S.C. § 1677e(a) or the best information otherwise available pursuant to 19 U.S.C. § 1677e(b), is in accordance with law or is supported by substantial evidence on the record.

Background

This action was commenced pursuant to 19 U.S.C. § 1516a(a)(2)(A) (1982 & Supp. 1986) to review the final determination by the ITA that photo albums and filler pages from Korea were or were likely to be sold at less-than-fair value. 50 Fed. Reg. 43,754 (Oct. 29, 1985).

After reviewing the petition, Commerce presented antidumping duty questionnaires to the plaintiff companies, which account for 64% of all exports of photo albums and filler pages from Korea to the United States. *Id.* at 43,755.

Subsequently, Commerce presented cost of production questionnaires to plaintiffs and responses were duly received. *Id.*

In determining whether sales of the subject merchandise in the United States were made at less-than-fair market value, Commerce compared the United States price based on the best information available with foreign market value, also based upon the best information available. Commerce stated it used the best information available as required by section 776(b) of the Act because adequate responses were not submitted to Commerce from plaintiffs. *Id.*

Discussion

The requirement for verification as set forth at 19 U.S.C. § 1677e(a) provides in part:

> (a) * * * the administering authority shall verify all information relied upon in making—
>
> (1) a final determination in an investigation,
>
> (b) * * * In making * * * determinations * * * the administering authority and the Commission shall, whenever a party or any other person refuses or is unable to produce information requested *in a timely manner* or *in the form required*, or *otherwise significantly impedes an investigation*, use the best information otherwise available. (Emphasis added.)

Implementing regulations for verification of information and the use of the best information available provide at 19 C.F.R. § 353.51(a) and (b)(1986) in part:

> (a) Information upon which a final determination is based shall be verified * * *.
>
> (b) Whenever information cannot be satisfactorily verified, or is not submitted in a timely fashion or in the form required, the submitter of the information will be notified ald [sic] the affected determination will be made on the basis of the best information then otherwise available which may include the information submitted in support of the petition. An opportunity to correct inadequate submissions will be provided if the corrected submission is received in time to permit proper analysis and verification of the information concerned; otherwise no corrected submission will be taken into account.

As pointed out by defendant United States, Commerce has apparently treated various types of inadequate responses differently. Defendants' Memorandum in Opposition to Plaintiffs' Motion For Judgment Upon the Agency Record at 22–23 (Defendants' Memo). While Commerce has followed the set pattern of correcting inadequate responses where it could, where deficiencies were either too numerous or too serious to remedy in time, the best information available rule has been employed.[1] The administrative practice of Commerce in deciding when to use the best information available seems to indicate that where the failure to submit adequate information has been seen as deliberate by the ITA, Commerce has apparently heavily favored using alternative "best information available" least favorable to a respondent.[2] Where inadequate information has pertained to only one or two limited aspects of a response such as an adjustment to foreign market value for interest expense or currency conversion loss, Commerce has, rather than apply the best Information otherwise available on a general basis, limited its use of the best information available to the specific items affected. *Id.* at 23–24.[3] Commerce has also applied limited use of the best information available where they have received inadequate responses or no responses at all concerning a certain time period of an investigation.[4]

The administrative practice of Commerce appears to demonstrate that it has recognized constraints as to what it can, in the limited time available to it in conducting an antidumping investigation, do to remedy deficient responses.[5]

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[1] *See, e.g., Certain Valves and Connections of Brass For Use In Fire Protection Systems From Italy*, 54 Fed. Reg. 3,520 (Jan. 24, 1989); *Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured, From the Republic of Korea*, 53 Fed. Reg. 48,672 (Dec. 2, 1988); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Italy*, 53 Fed. Reg. 45,324 (Nov. 9, 1988).

[2] *See e.g. Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured, From Israel*, 53 Fed. Reg. 48,670 (Dec. 2, 1988); *Light-Walled Welded Rectangular Carbon Steel Tubing From Taiwan*, 53 Fed. Reg. 46,900 (Nov. 21 1988); *Shop Towels of Cotton From China*, 50 Fed. Reg. 26,020 (June 24, 1985); *Cellular Mobile Telephones and Subassemblies From Japan*, 50 Fed. Reg. 45,447 (Oct. 31, 1985).

[3] *See e.g., Stainless Steel Sheet and Strap From France*, 49 Fed. Reg. 8,647 (Mar. 8, 1984); *Electric Motor From Japan*, 49 Fed. Reg. 32,627 (Aug. 15, 1984); *Color Television Receivers From Korea*, 49 Fed. Reg. 7,620 (Mar. 1, 1984).

[4] *See e.g., Steel Wire Rope From Japan*, 53 Fed. Reg. 44,058 (Nov. 1, 1988).

[5] *See e.g., Countervailing Duties, Final Rule*, 53 Fed. Reg 52,306 (Dec. 27, 1988) (to be codified at 19 C.F.R. § 355); *Ball Bearings and Parts Thereof From Singapore*, 53 Fed. Reg. 45,339 (Nov. 9, 1988); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Italy*, 53 Fed. Reg. 45,361 (Nov. 9, 1988).

The Court observes that the practice of Commerce appears to be founded with reasonableness, common sense and pragmatism in mind.

There appears little question that plaintiffs' responses to the questions of Commerce in the instant case contained numerous omissions, allocation errors, oversights and miscalculations. Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Judgment on the Agency Record at 16–33 (Plaintiffs' Memo); Defendants' Memo at 8–20; Brief of Defendant-Intervenors at 1, 3, 9–17.

Plaintiffs argue that the disregard by Commerce of plaintiffs' verified data was not in accordance with law and in the alternative, if Commerce was correct in its determination that all of the information from each plaintiff was unverifiable, the decision by Commerce to reject plaintiffs' responses *in toto* and to substitute as its basis for the final determination the unexamined data presented by petitioners is not in accordance with law. Plaintiffs' Memo at 34–35. According to plaintiffs, the statutory provision of allowing Commerce to base its decision on the best information implies the requirement to weigh and compare various available information and to use information that can reasonably be considered best. *Id.* at 35.

This Court rejects plaintiffs' contentions out of hand. As defendant-intervenors point out, if plaintiffs' argument were to prevail the result would be to undermine the administrative process and shift the burden of creating an adequate record from respondents to Commerce. Brief of Defendant-Intervenors at 4.

Commerce, in its final determination aptly pointed out that it could not use only portions of a response that were verifiable since this "would allow respondents to selectively submit data that would be to their benefit in the analysis of their selling practices." 50 Fed. Reg. at 43,755.

In *Atlantic Sugar, Ltd.* v. *United States*, 2 Fed. Cir. (T) 130, 133-34, 744 F.2d 1556, 1560 (1984), the Court in discussing the best information rule stated:

> * * * [I]t is set within the extremely short statutory deadlines which the Congress built into the new antidumping law and the resultant lack of time which the [agency] has * * * Thus cooperation by the parties to the investigation is essential, as well as diligence by the [agency] staff, to gather the data needed for an accurate determination. Noncooperation by parties or other persons may * * * be penalized, at least in the eyes of those parties or persons, by the [agency's] mandatory use of whatever other best information it may have available. In short, one may view the best information rule, as the [agency] urges, as an investigative tool, which that agency may wield as an informal club over recalcitrant parties or persons whose failure to cooperate may work against their best interest. One may as well view the rule in light of the legislative history * * * as a club over the [agency's] head, which Congress has brandished to

> force that agency to arrive at *some* determination within the time allotted. "Impossible" is a word Congress does not want to hear in these complex cases. (Footnotes omitted.)

In *Ceramica Regiomontana, S.A.* v. *United States*, 10 CIT 399, 636 F. Supp. 961 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987) (per curiam), the court held where the ITA found the information on subsidies provided by Mexico was inaccurate in material and significant respects, the agency was not required to use all information not proven correct.

Chief Judge Re stated: "Since the information supplied by the Mexican government was found, upon verification to be inaccurate in important respects, the ITA was under no obligation to use it even though some of it had not been proven inaccurate." 10 CIT 406, 636 F. Supp. at 967.

The failure of plaintiffs to furnish the information requested to the agency in a timely manner and in the form required justified the ITA in using the best information available. *Ansaldo Componenti S.P.A.* v. *United States*, 20 CIT 28, 628 F. Supp. 198 (1986).

CONCLUSION

This Court holds the agency's determination to employ the best information available was supported by substantial evidence of record or otherwise in accordance with the law. The final determination of sales at less than fair value with respect to photo albums and filler pages from Korea and its implementing order are affirmed and the complaint is dismissed.

(Slip Op. 89–16)

ALLEN SUGAR CO., H&R BROKERAGE DIVISION, PLAINTIFF *v.* NICHOLAS F. BRADY, SECRETARY, DEPARTMENT OF THE TREASURY; WILLIAM VON RAAB, COMMISSIONER, U.S. CUSTOMS SERVICE; U.S. CUSTOMS SERVICE; AND UNITED STATES, DEFENDANTS, AND UNITED STATES CANE SUGAR REFINERS' ASSOCIATION, DEFENDANT-INTERVENOR

Court No. 89–01–00020

CANADIAN SUGAR INSTITUTE, REDPATH INDUSTRIES, LTD., LANTIC SUGAR, LTD., PLAINTIFFS *v.* NICHOLAS F. BRADY, SECRETARY, U.S. DEPARTMENT OF THE TREASURY; WILLIAM VON RAAB, COMMISSIONER, U.S. CUSTOMS SERVICE; U.S. CUSTOMS SERVICE; AND UNITED STATES, DEFENDANTS

Court No. 89–01–00021

Before NICHOLAS TSOUCALAS, *Judge.*

[Defendants' motion to dismiss for lack of jurisdiction granted.]

(Decided February 9, 1989)

Miller & Chevalier (*Homer E. Moyer, Jr., Catherine Curtiss* and *William M. McGlone*) for Allen Sugar Company, plaintiff.

Steptoe & Johnson (*W. George Grandison, Stephen D. Ramsey, Jay H. Reiziss* and *Anthony LaRocca*) for Canadian Sugar Institute, Redpath Industries, Ltd., Lantic Sugar, Ltd., plaintiffs.

John R. Bolton, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*John J. Mahon*) for defendants.

Wilmer, Cutler & Pickering (*Daniel K. Mayers*) for defendant-intervenor.

OPINION

TSOUCALAS, Judge: The present action is before the Court on defendants' motion to dismiss for lack of jurisdiction. Plaintiffs[1] challenge the United States Customs Service's (Customs) classification of certain sucrose/dextrose blended sweetener products under item 1701.99.00[2] of the Harmonized Tariff Schedule of the United States (HTSUS). Plaintiffs claim the Court has jurisdiction under the Court's residual jurisdiction provision, 28 U.S.C. § 1581(i)(3) and (i)(4). Defendants assert that the Court lacks jurisdiction because plaintiffs have failed to exhaust their administrative remedies.

BACKGROUND

In April of 1988, domestic sugar producers filed a petition pursuant to section 516 of the Tariff Act of 1930, *as amended*, 19 U.S.C. § 1516 (1982 & Supp. IV 1986) and 19 C.F.R. § 175.11, asking Customs to reclassify blended sweetener products from edible preparations containing sugar, item 183.05, Tariff Schedules of the United States (TSUS) and item 958.18, TSUS, to sugar subject to the limited and country specific quotas for pure sugar, item 155.20, TSUS, and item 155.60, TSUS. In the alternative, the petitioners asked Customs to reclassify the product as edible preparations under item 183.05, TSUS, and item 958.15, TSUS, so as to remove them from item 958.18, TSUS, which was under different "global" quota on imports of sugar-containing food products.[3]

Customs neither acted on the petition nor published notice in the Federal Register, as required by 19 C.F.R. § 175.21(a),[4] that the petition had been filed and that interested persons could submit comments within a specified time period.

Plaintiff Allen Sugar attempted to import shipments of sucrose/dextrose blends on January 4, 1989, but the merchandise was excluded at the port of Buffalo because it had been reclassified under

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[1] Oral argument was held on January 27, 1989. Because of the similarity of the issues involved, the Court will issue one opinion.
Plaintiffs will be referred to, respectively, as "plaintiffs Canadian Sugar" and "plaintiff Allen Sugar."

[2] Item 1701.99.00 reads as follows:
Cane or beet sugar and chemically pure sucrose, in solid form:
* * * * * * *
Other * * *.

[3] Proclamation No. 5294, 3 C.F.R. 3 (1985), of January 28, 1985, established item 958.18, TSUS, which imposed an 84,000 short ton quota on certain sugar-containing food articles including blended sweeteners imported under item 183.05, TSUS.

[4] *See United States Cane Sugar Refiners Ass'n* v. *United States*, 12 CIT ——, Slip Op. 88–132 (Oct. 6, 1988), the court denied jurisdiction when the domestic industry petitioners sought to compel Customs to act on the petition after several months delay. Judge Watson ruled that this court lacked jurisdiction as plaintiffs in that action brought the action prematurely.

item 1701.99.00, HTSUS, the corresponding provision for item 155.20, TSUS, which required a different quota certificate before entry.

On January 12, 1989, Customs issued a ruling letter reclassifying the sucrose/dextrose blends under the section for cane or beet sugar, item 1701.99.00, HTSUS, on the grounds that "mixtures consisting of different materials shall be classified as if they consisted of the material which imparts the *essential character.*" Letter Ruling 082230 (Jan. 12, 1989) (emphasis added).

Plaintiffs did not protest the classification pursuant to § 1514, but seek a preliminary injunction restraining Customs from denying entry to blended sweeteners corresponding to item 958.18, TSUS, and from classifying these products under the allegedly comparable category, item 1701, HTSUS, pending resolution of the section 516 petition. Plaintiffs claim jurisdiction is proper under 19 U.S.C. § 1581(i),[5] since under the circumstances of this case, the filing of a protest is inappropriate and manifestly inadequate. *Plaintiffs' [Canadian Sugar] Memorandum in Opposition to Defendants' Motion to Dismiss* at 2.

The Government claims that the section 516 petition is moot as the TSUS was repealed on January 1, 1989, and that jurisdiction under § 1581(i) is not proper because plaintiffs must first exhaust their administrative remedies by filing an administrative protest under § 1514(a). The sole issue to be determined is whether this Court has jurisdiction under § 1581(i).

DISCUSSION

It is incumbent upon a party, when challenging a classification by Customs, to first exhaust its administrative remedies. *Nat'l Corn Growers Ass'n* v. *Baker,* 840 F.2d 1547, 1551 (Fed. Cir. 1988). Exhaustion of administrative remedies is required in order to "limit judicial review of strictly administrative judgments." *Id.* A party may bypass the administrative process, however, through invocation of § 1581(i), which "grants the court residual jurisdiction of any civil action arising out of the enforcement or administration of the customs laws." *Lowa, Ltd.* v. *United States,* 5 CIT 81, 87, 561 F. Supp. 441, 446 (1983), *aff'd,* 2 Fed. Cir. (T) 27, 724 F.2d 121 (1984). As plaintiffs attempt to avoid this process, "fairness dictates that only the most extraordinary of circumstances would permit the invocation of jurisdiction under section 1581(i) * * *." *Nat'l Corn Growers,* 840 F.2d at 1557.

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[5] Plaintiffs Canadian Sugar learned that the truckloads of blended sweeteners had been denied entry to the U.S. and that Customs indicated that it was considering classifying the blended sweeteners as pure sugar, thus rendering the products ineligible for entry under the quota for sugar-containing food articles.

Plaintiffs Canadian Sugar brought this action to challenge Customs' decision to issue Ruling 082230, which allegedly did not comply with the statutory procedures and safeguards for importer's rights that are part of the scheme established in section 516.

Plaintiffs were aware, prior to the attempted importation of the merchandise, of the impending change to the HTSUS and the potential classification change, but proceeded to enter into transactions which placed themselves in a precarious position with knowledge of this risk. Plaintiffs chose not to exercise their right to obtain a binding ruling from Customs prior to importation. *See American Air Parcel Forwarding Co.* v. *United States,* 2 Fed. Cir. (T) 1, 6, 718 F.2d 1546, 1551 (1983), *cert. denied,* 466 U.S. 937 (1984).

Section 1581(i) "may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co.* v. *United States*, 824 F.2d 961, 963 (Fed. Cir.1987) *cert. denied*, 108 S. Ct. 773 (1988) (citing *United States* v. *Uniroyal, Inc.*, 69 CCPA 179, 186–87, 687 F.2d 467, 475 (1982) (Nies, J., concurring)); *Lowa*, 5 CIT at 87–88, 561 F. Supp. at 446–47. The party asserting § 1581(i) jurisdiction has the burden to demonstrate the manifest inadequacy of the remedy under 1581(a). *Miller*, 824 F.2d at 963.

Plaintiffs had the opportunity to protest the exclusion of the subject merchandise and utilize the accelerated disposition procedure provided in § 1515 and 19 C.F.R. §§ 174.21–22. Section 1515(b) provides, in pertinent part, that

> a protest which has not been allowed or denied in whole or in part within thirty days following the date of mailing by certified or registered mail of a request for accelerated disposition *shall be deemed denied on the thirtieth day following mailing of such request.* [Emphasis added.]

See also 19 C.F.R. § 174.22(d). Under this procedure, the protest would have been acted upon no more than thirty days after filing, and plaintiffs could then have sought review in this Court through § 1581(a). Plaintiffs' allegations of irreparable injury and severe harm if forced to resort to § 1581(a) are not persuasive.[6] The Court finds that implementation of the accelerated procedure would have adequately protected plaintiffs' interest. No § 1581(i) jurisdiction is found where importers could have taken steps to qualify under § 1581(a), and the remedy under that subsection would have been adequate. *Miller*, 824 F.2d at 963 (citing *American Air Parcel*, 2 Fed. Cir. (T) at 4–7, 718 F.2d at 1549–51). The remedy available to plaintiffs was not manifestly inadequate; it was simply not sought. Consequently, plaintiffs have not met their burden.

Plaintiffs also claim that jurisdiction exists under § 1581(i) because of Customs' nonperformance of the statutory procedures and safeguards outlined in the regulations regarding the domestic sugar industry's section 516 petition. Specifically, that Customs never acted on the petition and never published notice in the Federal Register stating that the petition was filed, and inviting interested parties to comment. 19 C.F.R. § 175.21(a). The conversion from the TSUS to the HTSUS, plaintiffs continue, does not subvert the section 516 process that began on April 22, 1988.

While the Court cannot condone Customs' treatment of the section 516 petition, it remains that the petition involved *TSUS* classification of blended sweetener products. HTSUS classification of the

[6] Allen Sugar claims irreversible harm since other products containing sugar continue to enter the U.S. daily under the 84,000 ton quota, and that pursuing the administrative protest as a pre-condition to challenging Customs actions would be devastating. Correspondingly, plaintiffs Canadian Sugar claim to have detrimentally relied on the existing classification of blended sweeteners, the availability of the 84,000 ton quota, and the established section 516 procedures assuring notice, opportunity to be heard, and 30-day grace period before reclassification. Mere allegations of financial harm, however, do not make the remedy established by Congress manifestly inadequate. *Miller*, 824 F.2d at 964.

same products implicates an entirely different law, The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, 102 Stat. 1107 (1988), and whether the goods are correctly classified under the HTSUS entails a proper challenge through the administrative process, as outlined by the relevant statutes. It is, therefore, irrelevant whether Customs appropriately executed its duties regarding the section 516 petition, since the question of classification under the TSUS is not germane to the question of classification under the HTSUS in this circumstance.

Moreover, item 1701.99.00, HTSUS, is under the auspices of different guidelines which employ a different means of characterizing the merchandise. The present guideline, General Rule of Interpretation 3(b), states that the "essential character" of a blend will be the basis of its classification, rather than the product's "chief use," which was the basis under the headnote to repealed item 183.05, Schedule 1, Part 15, Subpart B, Headnote 3, TSUS. Any challenge with respect to the classification, therefore, must be effectuated within the parameters of the present statutory framework.

Plaintiffs are not saved by § 1211(d)(1)(A)(ii), Pub. L. No. 100–418, 102 Stat. 1107, 1154 (1988), which states that the new law does not divest the court of jurisdiction of any petition under section 516 covering articles entered before the effective date of the HTSUS. The section 516 petition here is not viable section 516 claim since it involves a provision no longer in effect, item 183.05, TSUS, and goods to be entered after January 1, 1989.

Plaintiffs further contend that the instant action involves a change in quantitative restrictions, rendering § 1581(i)(3) and/or (i)(4) a proper jurisdictional grounds on that basis, and cite as support *American Ass'n of Exporters and Importers* v. *United States,* 7 CIT 79, 583 F. Supp. 591 (1984), *aff'd,* 3 Fed. Cir. (T) 58, 751 F.2d 1239 (1985); *United States Cane Sugar Refiners' Ass'n* v. *Block,* 3 CIT 196, 544 F. Supp. 883, *aff'd,* 69 CCPA 172, 683 F.2d 399 (1982). However, the cases cited by plaintiffs involve direct quantitative restrictions. The present action, on the other hand, pertains to the classification of merchandise as the primary issue, which happens to result in the merchandise being subject to a more restrictive quota. The distinction is significant as it is truly a classification question.

"[T]he existence of a specific statutory scheme, which provides for administrative and judicial review of determinations of classification and rate of duty, precludes the court from assuming jurisdiction of this action under § 1581(i)." *Lowa,* 5 CIT at 90, 561 F. Supp. at 448. Therefore, the Court's residual jurisdiction under § 1581(i) is not properly invoked and the action is dismissed

(Slip Op. 89–17)

WASHINGTON INTERNATIONAL INSURANCE CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 84–09–01315

[Defendant's motion for summary judgment granted.]

(Dated February 9, 1989)

Sandler & Travis (*Ellen Rubin*) for plaintiff.

John R. Bolton, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Civil Division, United States Department of Justice (*Saul Davis*) for defendant.

OPINION

RESTANI, Judge: This case involves a dispute over liquidation of imported footwear from South Korea. At the time of entry the subject goods were given duty-free status. Customs later determined that such status did not apply, and a duty of 37.5% *ad valorem* was assessed. Plaintiff claims that the government failed to properly liquidate the subject goods at the increased duty rate within the one year period required by statute and accordingly, that the goods must be deemed liquidated at the rate at which they were entered, that is, duty-free. *See* 19 U.S.C. § 1504 (1982 & Supp IV 1986). Plaintiff has filed a motion pursuant to Rule 56 of the Rules of this Court seeking summary judgment. Defendant cross-moves for summary judgment based upon a lack of jurisdiction. it also claims that liquidation occurred properly within the one-year period.

The court finds that it lacks jurisdiction as plaintiffs have failed to fulfill the requirements of 19 U.S.C. § 1514(c)(2) (1982), the predicate to jurisdiction under 28 U.S.C. § 1581(a) (1982).[1] The Court therefore grants defendant's motion for summary judgment.

BACKGROUND

This case involves two consolidated actions. With the exception of one important difference, to be discussed later, the fact pattern of the two actions are essentially identical. Red Line Shoe, Inc. ("Red Line") is the importer of record in both actions. Plaintiff, Washington International Insurance Company, is the surety for Red Line. Red Line imported two shipments of footwear parts and leather shoe uppers into the United States. The first shipment entered the United States on or about May 12, 1982. The second shipment entered on June 9, 1982. The importer entered the shipments under the tariff provisions for leather shoe uppers, item A791.2700, TSUS (1982), and for parts of footwear, item A774.5035, TSUS (1982). Pursuant to the Generalized System of Preferences, both provisions are duty-free items for South Korean merchandise. Due to the fact that the footwear parts and uppers were imported in the same shipment,

[1] In the event that the court is in error and that it possesses jurisdiction, it would nonetheless grant defendant's motion for the reasons discussed herein relating to notice of liquidation.

Customs Service treated them as entireties and classified the merchandise under item 700.57, TSUS (1982). dutiable at 37.5% *ad valorem*. Neither the importer nor plaintiff has disputed this application of the entireties doctrine. Thus, the substance of Customs' decision is not challenged.

On August 20, 1982, Customs liquidated the first entry posting the notice of liquidation under the name "Japan Books & Gifts, Inc." ("Japan Books") rather than under the name "Red Line.[2] Customs liquidated the second entry on October 7, 1983, again using the name Japan Books in its official notice of liquidation. Apparently, Customs posted the notices under the name Japan Books because that name corresponded with the importer identity number supplied to Customs by the importer Red Line. In addition to posting an official notice of liquidation, Customs generated a courtesy notice of liquidation and a bill for increased duties, both of which were sent to Japan Books & Gifts, Inc. *See* Painter Affidavit attached to *Defendant's Response*.[3]

When Red Line did not pay the liquidated duties assessed against it, two separate demands for duties owed were made upon the surety, one for each entry. Plaintiff timely filed its protests to such demands with Customs claiming liquidation at the entered rate by operation of law.[4] Both protests were denied. Whereupon, plaintiff filed suit with this court.

DISCUSSION

Defendant argues that Plaintiff did not satisfy the requirements of 19 U.S.C. § 1514(c) (2), the satisfaction of which is a prerequisite to this court's jurisdiction. 19 U.S.C. § 1514(c)(2) states in relevant part:

> A protest by a surety which has an unsatisfied legal claim under its bond may be filed within 90 days from the date of mailing of notice of demand for payment against its bond. *If another party has not filed a timely protest, the surety's protest shall certify that it is not being filed collusively to extend another authorized person's time to protest as specified in the subsection.* (emphasis added).

Plaintiff does not dispute that it did not file the appropriate certification as required by § 1514(c)(2). Instead plaintiff asserts that it is "ironic" that the government now argues that plaintiff was required to file a certification considering that there is no evidence that the government ever sought payment from the importer of re-

[2]On March 25, 1983, the bulletin notice was re-posted with the name "Japan Books & Gifts, Inc." stricken in red. On this same notice, Red Line was properly indicated as the importer of record. As the Court noted in a letter to the parties dated September 28, 1987, there would seem to be no problem with the liquidation of this entry. The regulations stipulate that liquidation must occur in one year. Customs corrected the notice of liquidation within the one year period, rendering the liquidation proper under any theory.

[3]Considering the apparent closeness of the two companies' business relationship, i.e., the two importers were located at the same address and were close enough so that Red Line has access to Japan Book's identity number, the court views skeptically plaintiffs assertion that the importer of record did not receive notice of liquidation. In any case, initially Customs did what it reasonably could be required to do vis-a-vis an importer providing an improper identity number.

[4]The protest to the demand referencing the first entry was filed on January 27, 1983. The protest to the second demand, referencing the second entry, was filed on November 16, 1984.

cord. The court fails to see the relevancy of this assertion. Section 1514(c)(2) by its terms requires the surety to certify that it is not acting collusively. The provision does not say that it is applicable only in a case where the government has made a demand on the importer.[5] Nor does the legislative history of the provision suggest that this should be the case.[6]

Instead, the legislative history underscores the underlying *quid pro quo* which is the basis for the 1979 amendment. Prior to the 979 amendment, a surety, like its principal, had only 30 days from the date of decision in which to file protest. In 1979, Congress extended a surety's time for protesting because it found that the surety was oftentimes disadvantaged by Custom's policy of not notifying the surety that liquidation had occurred. The result of this policy was that the surety would often not discover that liquidation had occurred until the 30 day time period had run. To remedy this problem, Congress extended the time period in which a surety could file protest to 90 days. *Peerless Insurance Co.* v. *United States*, 12 CIT ——, Slip Op. 88–177 at 4 (Dec. 30, 1988). In return for this benefit, Congress required the surety to file a certification that it was not acting collusively with the principal in order to extend the 30 day time period in which the principal had to protest. One obvious purpose of this provision was to lessen the administrative burden on Customs of having to investigate and determine whether the surety and principal were acting collusively each time a surety protested beyond the 30 day time period allowed its principal.

Plaintiff has asserted no reason for not complying with the certification requirement. Furthermore, given the ease of filing such a certification, the court is hard-pressed to conceive of what such a reason might be.[7] In addition, the court finds no other equitable reason which would warrant waiver of the certification requirement, assuming *arguendo* that compliance with such requirement was intended to be waivable in certain circumstances.[8] That is, plaintiff's substantive claims do not cry out for court action.

As noted earlier, in regard to the first action, Customs reposted the notice of liquidation with the correct importer name within the one year liquidation period specified by statute. *See* 19 U.S.C. § 1504. Because proper liquidation occurred within the statutorily prescribed time-period, plaintiff would have no cause of action re-

[5]Plaintiff asserts that there is "no evidence" that the government ever sought payment from Red Line. Yet plaintiff does not dispute that Customs generated two courtesy notices of liquidation and bills which it sent to Red Line's address, albeit addressed to Japan Books. It was not until a demand for payment was made upon plaintiff, and plaintiff had filed the first of its two individual protests, that Customs became aware that it had listed the wrong importer's name on the notice of liquidation for the first entry.

[6]The legislative history says:
It is also clear under present law that sureties have had difficulty in fulfilling the prerequisites to suit in the Customs Court due to the frequent failures of the sureties to receive notice of the failure of the importer to pay the duties until after the time for filing a protest has expired. Section 1001(b)(3)(E) would remedy this problem by permitting a surety to file a protest in its own name and by extending the time within which it may file a protest *so long as it certifies that it is not filing the protest simply because the importer allowed his time to file a protest to expire without filing a protest*, (emphasis added).
S. Rep. No. 249, 96th Cong., 1st Sess. 254, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 640.

[7]Plaintiff claims the certification was not necessary here because the importer is not locatable. Thus, it argues collusion was an impossibility. The statute does not exempt a party from certifying non-collusion in such circumstances and no sufficient reason for finding such a Congressional intent has been offered. This court finds no *per se* rule allowing omission of certification in such circumstances.

[8]Additionally, both parties have made what the court considers overly broad, if not frivolous, arguments about the meaning of the words "a protest by a surety which has an unsatisfied legal claim" as set forth in 19 U.S.C. § 1514(c)(2). In view of the court's other reasons for its decision, the court will not address such arguments.

garding this first entry even if jurisdiction were present. As to the second entry, plaintiff asserts that "the liquidation is illegal, null and void, since the bulletin notice of liquidation shows an incorrect importer of record." Plaintiff's Brief at 4. Plaintiff claims that as to this entry, a deemed liquidation occurred when Customs failed to notify either the importer of record, or the surety, within the one year liquidation period, that liquidation had occurred.

In response to this argument, defendant claims that liquidation and notification are two separate events and that, consequently, an improper notification does not nullify or void an appropriate liquidation. Defendant argues that the term "liquidation" applies only to the "final administrative determination of duties due" not to the notification procedure. *See* Defendant's Brief at 4. Following this rationale, defendant asserts that because it properly calculated the amount of duties owed on the entry at the time it posted the original notice, the liquidation was proper and completed within the prescribed one year period. The government is of the view that a defective, or improper notification bears no relation to the liquidation itself.

Contrary to defendant's position, the court finds that notice is a necessary component of liquidation. 19 C.F.R. § 159.9(c) provides:

> The bulletin notice of liquidation shall be dated with the date it is posted or lodged in the customhouse for the information of importers. The entries for which the bulletin notice of liquidation has been prepared shall be stamped "Liquidated," with the date of liquidation, which shall be the same as the date of the bulletin notice of liquidation. This stamping shall be deemed the legal evidence of liquidation.

Thus, Customs itself, at the time it enacted this provision, envisioned that notice would be an integral part of the liquidation procedure. Section 159.9(c) clearly specifies that it is the act of giving notice which gives legal stature to the event of liquidation. Without a public declaration, the liquidation has no legal effect. There is no such thing as a secret liquidation.[9]

In the present case, however, it appears that the notification of liquidation with regard to plaintiff's second entry of goods was sufficient to give the liquidation legal effect. Although Customs posted the notice of liquidation using an incorrect importer's name, the mistake in this case was originally caused by Red Line when it incorrectly listed the importer identification number of Japan Books. Plaintiff does not dispute this fact, but instead simply asserts that

[9]This is not the same as saying that such a liquidation may be "void," but, nonetheless, is protestable, as defendant would argue. A liquidation without notice is simply not a liquidation. No one could possibly be held to protest an event which could not be known, even upon reasonable inquiry. Furthermore, the purpose of 19 U.S.C. § 1504 and its one year liquidation requirement is to limit the period in which changes in the liability of importers are allowed. Prior to enactment of section 1504, an importer may not have learned until years after its goods had been imported and sold that additional duties were due, or conversely may have deposited more money for estimated duties than were actually due, but could not recover the excess until years later when liquidation occurred. Section 1504 was enacted to remedy the uncertainty of the liquidation process, thereby enabling the parties to better control their liabilities. *See* S. Rep. No. 778, 95th Cong., 2d Sess. 32, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2211, 2243. The government's interpretation of "liquidation" completely vitiates the purpose of section 1504; for without notice, the importer/surety has no better knowledge of its potential liabilities than it had prior to the enactment of § 1504.

the notice was inadequate because Customs had an affirmative duty to discover that the name listed on the entry bond did not match the entry number which was listed on the same bond.

Customs has filed an affidavit, the essential facts of which are not disputed, asserting that its operation as they relate to liquidation are computerized. *See* Painter Affidavit. According to Customs, its computer program is such that Customs notifies the operator that an error has occurred only when the number inserted is wrong, in the sense that the number inserted does not match up with the number of any importer of record on the Customs list. In this case, the importer provided a working number to Customs. The number provided was that of another importer whose offices were located at the same address as the actual importer involved in the relevant entry. Thus, the court finds that even though the second entry was not re-posted with the correct name within the one year period, there is no reason in this case to disapprove totally the notification procedures which Customs did employ.[10] Thus, viewing this case as a whole, and assuming *arguendo* that Congress intended that some of the technical requirements of section 1514(c)(2) could be waived in appropriate cases, the court finds no reason to relieve plaintiff of any of the technical burdens of the protest procedure in this case. The liquidation is not claimed to be substantively at an improper rate, the notice of liquidation was adequate given the circumstances, and plaintiff has offered no reason why it could not provide the simple certification required at the time of protest.

Accordingly, defendant's motion for summary judgment is granted and the action is dismissed.

(Slip Op. 89–18)

SERAMPORE INDUSTRIES PVT. LTD., ET AL., PLAINTIFFS *v.* U.S. DEPARTMENT OF COMMERCE, DEFENDANT, AND ALHAMBRA FOUNDRY CO., ET AL., DEFENDANT-INTERVENORS

Before DICARLO, *Judge.*

Court No. 86-06-00743

[Second remand results affirmed.]

(Decided February 10, 1989)

Kaplan, Russin & Vecchi (*Dennis James, Jr.*) for plaintiff.

John R. Bolton, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*A. David Lafer*); United States Department of Comerce (*Duane W. Layton*) for defendant.

[10]This is not a case in which renoticing of the liquidation at this point would assist anyone. Plaintiff seeks a complete nullification of the liquidation, not an opportunity to argue the substance of the classification. The court does not decide in what circumstances renoticing would be appropriate.

Collier, Shannon, Rill & Scott (*Paul C. Rosenthal* and *Carol A. Mitchell*) for defendants-intervenors.

DiCarlo, *Judge:* This case is before the Court to review the second remand results ordered in *Serampore Indus.* v. *United States Dep't of Commerce,* 12 CIT ——, 696 F. Supp. 665 (1988). Commerce was ordered to (1) account for two tax rebates paid to Serampore Industries Pvt. Ltd. (Serampore) under an Indian Cash Compensatory Support (CCS) program and (2) correct an alleged computer input error. Serampore concurs in the second remand calculations, which show a *de minimis* dumping margin of 0.487 percent.

Discussion

I. *Tax Rebate Adjustments*

While all parties agree Serampore incurred a Freight Equalization Fund (FEF) levy and a turnover tax, defendant-intervenors (the "domestic industry") argue there is neither evidence that Serampore received a CCS rebate for those payments nor an express claim by Serampore during the investigation that it received CCS rebates for these tax payments.

The domestic industry's objections were already addressed in *Serampore Indus.* v. *United States Dep't of Commerce,* 12 CIT ——, 696 F. Supp. 665, 672–73 (1988). The Court found that Serampore had made a claim for rebates of the full tax incidence, including the FEF levy and turnover tax, and had never abandoned its claimed adjustment. In the interest of fundamental fairness, the Court remanded as a matter of discretion for Commerce to account for rebates of both the FEF levy and the turnover tax.

Commerce recalculated Serampore's constructed value net of those indirect taxes, including the FEF levy and turnover tax, which Serampore incurred during the period of investigation and which the CCS program or the excise duty drawback on pig iron subsequently rebated upon export. *Second Remand Results,* at 8. Where the taxes incurred exceeded the total export parments received, the adjustment under 19 U.S.C. § 1677b(e)(1)(A) was limited to the export payments. *Second Remand Results,* at 12. Where the amount of, taxes paid was less than the applicable export payments, the adjustment was limited to the level of taxation. *Memorandum in Response to Comments on Second Remand Results,* at 10.

In calculating CCS, Commerce computed a f.o.b. value for each United States sale, aggregated the total f.o.b. sales value, and divided this amount by the total weight of the merchandise. *Id.* at 11. This calculation produced weighted-average f.o.b. values for heavy and light castings, which Commerce then converted from rupee/pound amounts to rupee/metric ton amounts. *Id.* Commerce multiplied the resulting values by 10% for light castings and 5% for heavy castings to produce the weighted-average CCS amounts. *Id.* at 11–12.

The domestic industry alleges that Commerce erred in calculating CCS tax rebates on a weighted-average basis. They contend that raw materials cost component overstates the actual CCS rebate received, because the f.o.b. value of some United States sales is below average.

The adjustment Commerce made to Serampore's raw material costs for light castings under 19 U.S.C. § 1677b(e)(1)(A) does not exceed the CCS rebate amounts calculated by the domestic producers. *See id.* at 12–13. The Court finds that Commerce's methodology in constructing the raw materials cost does not overstate the actual CCS rebates.

II. *Computer Input Error*

The Court remanded for Commerce to review observation number 7, index document number 9, at page 2 of the computer data, which showed an ocean freight entry of 1.1 instead of 0.0 for a f.o.b; sale. Commerce determined the entry was an error and made the appropriate correction.

CONCLUSION

The final dumping margins, incorporating both Commerce's second remand calculations for Serampore and those remand calculations affirmed in *Alhambra Foundry Co., Ltd.* v. *United States,* 12 CIT ——, Slip Op. 88–160 (1988), are as follows:

Manufacturers/seller/exporters	Weighted average margin percentage
RSI (*de minimis*) (excluded)	0.02
Kejriwal	2.93
Serampore (*de minimis*) (excluded)	0.487
Kajaria (*de minimis*) (excluded)	0.04
All others	2.93

Commerce states that it will adhere to its traditional practice and round the dumping margin for Serampore to 0.49 when it publishes these results in the *Federal Register.* This rounded figure will still be less than the 0.50 percent *de minimis* margin in 19 C.F.R. § 353.24(a) (1988). Commerce's remand results are affirmed and the action is dismissed.

(Slip Op. 89–19)

U.H.F.C. CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83–11–01598

Before MUSGRAVE, *Judge.*

[Judgment for defendant.]

(Decided February 14, 1989)

OPINION

Neville, Peterson & Williams (*John M. Peterson*), for the plaintiff.

John R. Bolton, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*Elizabeth C. Seastrum*), Civil Division, United States Department of Justice, for the defendants.

BACKGROUND

This lawsuit was commenced in accordance with Section 516A of the Tariff Act, *as amended,* 19 U.S.C. § 1516a, to seek review of a final determination of the U.S. Department of Commerce, International Trade Administration (ITA) in a 19 U.S.C. § 1675(a) administrative review of Treasury Decision 78–2, an outstanding Finding of Dumping against *Animal Glue and Inedible Gelatin from the Netherlands.* Notice of the contested determination was published in the *Federal Register* on October 6, 1983. 48 Fed. Reg. 45583–84.

The administrative review which is the subject of this lawsuit covered entries of *Animal Glue and Inedible Gelatin from the Netherlands* made during the period from December 1, 1980 through November 30, 1981. Through their review, ITA determined that antidumping duties in a weighted average amount of 24.60% *ad valorem* should be collected on entries made during that period of animal glue manufactured in the Netherlands by B.V. Lijmfabriek C. Trommelen ("Trommelen"). Plaintiff, who imported substantial quantities of such animal glue during the period covered by the review, challenges the manner in which ITA determined foreign market value with respect to entries of Trommelen merchandise during the period of review. The court has jurisdiction under 28 U.S.C. § 1581(c) (1982).

FACTS

A. *Description of Subject Merchandise*

This case concerns the appraisement under the antidumping law of various grades of animal glues, of which there are two principle types: hide glue and bone glue. The glues which are the subject of this lawsuit are hide glues.

The production process for a particular hide glue will depend upon the raw material used. Where glue is produced from "hide-cuttings" (e.g. headskins) and/or "splits" (i.e., waste parts generated by the "splitting" of hides during the tanning process), the hide-cut-

tings and splits are stored in a solution which has the effect of hydrolyzing the insoluble collagen in the raw materials into water-soluble proteins. Afterwards, the treated materials are submitted to a "washing" process, which is repeated several times, which permits the soluble proteins to be extracted from the prepared raw materials. The diluted glue solution which results is thereafter concentrated and dried. Proteins extracted during the first washing produce glue of the highest quality and strength; each successive washing yields successively weaker glues.

A third type of raw material used in the production of hide glues is "fleshings" (i.e., connective tissues scraped from a hide during the tanning process). Because "fleshings" have a different molecular structure than either "hide-cuttings" or "splits", they are processed separately in a process which yields glue-water, which is then distilled into glue.

Animal glues are graded on the basis of comparative jelly and viscosity values. Jelly-strength is measured in "Bloomgrams" and ranges from 30 bloomgrams (weak jelly) to approximately 500 bloomgrams (very strong jelly). Viscosity measurements range from 25 millipoises (watery glue) to about 200 millipoises (very viscous glue).

Glue is priced according to its jelly-strength; glues of high jelly-strength generally command a higher price than those of lesser jelly strength. A glue's strength depends on the characteristics of the particular raw materials used, and generally cannot be determined by measurement until after manufacture.[1]

Depending upon its strength, animal glue is used for a variety of purposes such as a general adhesive, an abrasive, or as a sizing agent (i.e., glaze or filler).

B. *The Contested Determination*

On December 23, 1976 representatives of the United States industry engaged in the manufacture of animal glue and inedible gelatin filed a petition with the Secretary of Treasury ("Treasury") seeking the imposition of antidumping duties against animal glue and inedible gelatin imported from the Netherlands and three other nations. On August 3, 1977 Treasury determined that animal glue and inedible gelatin from the Netherlands was being sold in the United States at less than fair value (LTFV). 42 Fed. Reg. 39289–90. On October 31, 1977 the U.S. International Trade Commission ("ITC") determined that an industry in the United States was being or was likely to be injured by reason of such LTFV imports from the Netherlands. 42 Fed. Reg. 57565. On December 22, 1977 Treasury promulgated Treasury Decision 78–2, a Finding of Dumping against *Animal Glue and Inedible Gelatin from the Netherlands.* 42 Fed. Reg. 64115.

[1]Glues of different strengths are often blended in straight mathematical proportions to yield a mixture of desired quality. Thus, an order for 200 pounds of glue of 300 bloomgrams could be filled by mixing 100 pounds of 250 bloomgram glue with 100 pounds of 350 bloomgram glue. (Plaintiff's Brief at 8.)

On January 2, 1980 authority for administering the antidumping law was transferred from Treasury to the Commerce Department pursuant to the Trade Agreements Act of 1979. Since 1980, ITA has conducted three Section 751(a) reviews of Treasury Decision 78–2. Final results of the second such review (which is the subject of this action) encompassed entries made from December 1, 1980 through November 30, 1981, and were published in the Federal Register on October 6, 1983. 48 Fed. Reg. 45583–84. During the period from December 1, 1980 to November 30, 1981 Trommelen sold to plaintiff U.H.F.C. (an unrelated U.S. glue importer) animal hide glues of the following bloomgram strengths: 250, 350, 365, 380, and 450. (R. 74–75.) Trommelen's sales in the Netherlands were of glues having bloomgram strengths of 150, 170, 190, 210, 220, 230, 260, 290, 300, and 400. (R. 64–66.)

On December 21, 1981 an antidumping questionnaire was mailed to Trommelen, which was granted an extension of the deadline for its questionnaire response until February 26, 1982. (R. 42.) The response, which was received on March 1, 1982 (R. 57), requested that foreign market value be calculated using sales to third countries (Rumania and the United Kingdom). The response stated that Trommelen's Netherlands (home market) sales accounted for 4.9% of its total sales during the period under review. (R. 58.) Trommelen also reported that "[jelly strength] expressed in bloomgrams is determining [sic] the price," along with certain other factors. (Defendant's Brief at 6.)

Trommelen submitted a supplemental questionnaire response to the ITA on August 13, 1982, claiming price adjustments based upon the differences between the quantity of sales in the home country and the U.S., and because of differences in jelly-strength. The price lists of other companies were submitted by Trommelen in support of its claim for price adjustments. The ITA requested further information about the claimed adjustments, which information Trommelen did not, or was not able to, supply.

The ITA published the preliminary results of its review on January 17, 1983. 48 Fed. Reg. 2030. In calculating the foreign market value, ITA

> "used home market price, as defined in Section 773(a) of the Tariff Act, since sufficient quantities of such or similar merchandise were sold in the home market to provide a basis for comparison. Home market price was based on the delivered price with adjustments for inland freight and differences in the packing costs, where applicable.
>
> [ITA] denied a claimed adjustment for differences in the merchandise, since no data quantifying home market difference was supplied. No other adjustments were claimed or allowed." (R. 151–152.)

Trommelen's duty rate was preliminarily found to be 23.7%.

In calculating the fair value margins of Trommelen's products ITA compared U.S. glue sales of 250 bloomgrams with home market glues of 300 bloomgrams, and U.S. sales of 350, 365, 380, and 450 bloomgrams with home market sales of 400 bloomgrams. (R. 134.) There were no home market sales of the same glue strength as U.S. sales.

The ITA issued its final results of the review on September 28, 1983. 48 Fed. Reg. 45583. The dumping margin for Trommelen's products was found to be 24.60%. The agency based the margin upon the same comparisons as those made in the preliminary results of review, as the best information available. (R. 244.)

Issues Presented

This case presents three issues for review:

(1) Whether the ITA's decision to base its determination of foreign market value upon home market sales is supported by substantial evidence and is otherwise in accordance with law?

(2) Assuming that Trommelen's home market sales were an adequate basis for determining foreign market value, whether ITA's denial of an adjustment to foreign market value for physical differences in the merchandise is supported by substantial evidence and is otherwise in accordance with law?

(3) Whether ITA's use of sales of 300 bloomgram glue as the basis for determining foreign market value for grade 250 glue was in accordance with law?

Discussion

The Antidumping Act provides that if foreign merchandise is sold or is likely to be sold in the United States at less than fair value, to the material injury of a U.S. industry, then an antidumping duty shall be imposed. 19 U.S.C. § 1673. The amount of the duty shall equal the amount by which the foreign market value exceeds the United States price for the merchandise. *Id.*

Foreign market value is computed by one of three methods: (1) home market sales; (2) third country sales; or (3) constructed value. 19 U.S.C. § 1677b(a). The preferred method is the first mentioned—"the price, at the time such merchandise is first sold within the United States * * * at which such or similar merchandise is sold, or in the absence of sales, offered for sale in the principal markets of the country from which exported * * * for home consumption." 19 U.S.C. § 1677b(a)(1)(A). Only if such or similar merchandise is not "sold or offered for sale for home consumption, or if the administering authority determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an adequate basis of comparison" may the ITA compute foreign market value using prices at which such or similar merchandise is sold for

export to third countries or by use of constructed value. 19 U.S.C. § 1677(a).

The term "such or similar merchandise" is defined in Section 771(16) of the 1930 Tariff Act, *as amended*, 19 U.S.C. 1677(16), in a fashion which is also hierarchical:

> (16) Such or similar merchandise.—The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:
>
> (A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise—
>
> (i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,
>
> (ii) like that merchandise in component material or materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise—
>
> (i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
>
> (ii) like that merchandise in the purposes for which used, and
>
> (iii) which the administering authority determines may reasonably be compared with that merchandise.

1. *Whether the ITA's decision to base its determination of foreign market value upon home market sales is supported by substantial evidence and is otherwise in accordance with law?*

(A) *Whether the merchandise sold in the home market was "similar" to that sold in the U.S.?*

Both parties agree that Trommelen did not make any home market sales of identical ("such") merchandise during the period under review. The next inquiry, then, is whether Trommelen sold glues in the Netherlands which were "similar" to those exported to the United States, within the meaning of 19 U.S.C. § 1677(16) (B) or (C).

During the period of review Trommelen sold for export to the U.S. glues having jellystrengths of 250, 350, 365, 380, and 450 bloomgrams, while its home market sales were of jellystrengths of 150, 170, 190, 210, 220, 230, 260, 290, 300, and 400 bloomgrams (R. 63–65). Plaintiff contends that the glues used for the basis of the comparison were not "similar", and that the ITA should have relied on Trommelen's third country sales of identical glues in determining foreign market value.

Because plaintiff contends that the glues sold in the home market were not similar to those sold in the U.S. it is necessary only for one of the three definitions set out in Section 1677(16) to apply in order for defendant to prevail on this issue. Thus we need look only to the most general definition of "such or similar merchandise", which is set out in part (C) of the statute.

The first part of that definition requires that the merchandise be produced in the same country, and by the same person, and be of the same general class or kind as the merchandise which is the subject of the investigation. The merchandise considered by the ITA was animal glue. While the glues compared were of different quality grades, it cannot be disputed that the two products were of the same general class or kind. Likewise, it is undisputed that the glues were produced in the same country and by the same person, all the glues in question having been produced by Trommelen in the Netherlands. Thus the first criterion of the definition is satisfied.

The second criterion is that the merchandise be like the merchandise which is the subject of the investigation in the purposes for which used. Plaintiff contends that the glues being compared are not used for like purposes, asserting, for example, that 250 bloomgram glue is used primarily in the manufacture of sand paper and similar abrasive products, while 300 bloomgram glue is used by the paper industry as a sizing material. As defendant points out, however, plaintiff is focusing on a single dissimilar use of these two glues, and ignoring the many common uses to which these glues may be put. Thus, the second criterion of Section 1677(16)(C)'s definition is deemed satisfied.

The final criterion is that the merchandise be merchandise which the administering authority determines may reasonably be compared with that which is the subject of the investigation. As stated in *Consumer Prod. Div., SCM Corp.* v. *Silver Reed America, Inc.* 753 F.2d 1033 (1985), the Secretary of Commerce has been entrusted with the responsibility for implementing the antidumping law and has broad discretion in its execution. Furthermore, "the Secretary's interpretation of the statute need not be the only reasonable interpretation or the one which the Court views as the most reasonable." *Id.* at 1039. Given the evidence on the record, the Court finds that the ITA did not abuse its discretion in determining that the glues used as the basis for its comparison may reasonably have been compared.

In short, it is the opinion of the Court that the glues sold in the Netherlands and in the U.S. were "similar" within the meaning of Section 1677(16)(C).

(B) *Whether there were sufficient home market sales to serve as a basis for determining foreign market value?*

Although 19 U.S.C. § 1677b(a)(1)(B) states that home market sales may not be used as the basis for establishing foreign market value

"if * * * the quantity sold for home consumption is so small in relation to the quantity sold for exportation * * * as to form an inadequate basis for comparison * * *", the statute does not state a necessary minimum requirement for the quantity of home market sales. However, section 353.4(a) of the Commerce regulations, 19 C.F.R. § 353.4(a), provides that home market sales must normally equal at least five percent of the amount of sales to third countries to be an adequate basis for determining foreign market value.

Trommelen's home market sales of glue for the period under review were equal to 6.07% of third country sales by volume. (R. 70.) Plaintiff admits that this figure appears to be within the "five percent rule" of 19 C.F.R. § 353.4(a), but argues that this is not in itself dispositive of the question, stating that the regulation "is not absolute, but is a purely artificial formulation which is intended merely as a 'rule of thumb.' " (Plaintiff's Brief at 17.)

Plaintiff's basic argument is that the glues which Trommelen sold in its home market were neither identical nor similar to those sold in the U.S. As has already been indicated above, however, the Court finds that Trommelen did sell glues in the Netherlands which were "similar" to those exported to the U.S. within the meaning of 19 U.S.C. § 1677(16)(C). Nonetheless, where significant differences between "similar" merchandise have been found, the ITA has rejected the use of home market sales in determining foreign market value, in favor of third country sales or constructed value. *See e.g. Motorcycle Batteries from Taiwan,* 47 Fed. Reg. 9264 (1982); *Certain Electric Motors from Japan,* 45 Fed. Reg. 73723 (1980).

In *Motorcycle Batteries from Taiwan, supra,* for example, the ITA declined to use home market sales as a basis for foreign market value, despite the fact that they accounted for approximately 10% of sales to third countries. The ITA's decision was based on the ground that all home market sales were of a single battery model (which accounted for less than 3% of the sales to the U.S.), whereas sales to the U.S. were of seventeen different models, with a wide variance in specifications. 47 Fed. Reg. 9264, 9267 (1982). This stands in contrast to the instant case in which a wide range of similar (albeit not identical) glues were sold both in the home market and in the U.S.

In *Certain Electric Motors from Japan, supra,* the ITA determined that the use of home market sales would have required innumerable cost adjustments[2] and noted that, unlike the case of U.S. sales, the motors were often sold as parts of entire power plants and were usually specially designed to customer specifications.

Given the fact that Trommelen's home market sales satisfy the five percent standard of 19 C.F.R. § 3534(a) and the fact that the merchandise in question is similar and does not present any unusual circumstances (e.g. number of adjustments which would have to

[2] "Any comparison between the two would require cost adjustments for virtually every component except the motor frame and thus, for all practical purposes, would amount to a constructed value." 45 Fed. Reg. 73723, 73725 (1980).

be made) the Court finds that it was reasonable and in accordance with the law for defendant ITA to rely on home market sales as a basis for determining foreign market value, in accordance with 19 U.S.C. 1677b(a)(1)(A).

Plaintiffs argue that defendant should have used sales by Trommelen to a 3rd country, (UK).[3] But ITA has discretion to use home market sales if it deems them more appropriate and this Court will not substitute its own view for that of the agency.

2. *Assuming that Trommelen's home market sales were an adequate basis for determining foreign market value, whether ITA's denial of an adjustment to foreign market value for physical differences in the merchandise is supported by substantial evidence and is otherwise in accordance with law?*

The Tariff Act, *as amended,* provides that certain adjustments shall be made in the calculation of foreign market value to allow for a more realistic comparison with United States prices. Specifically, if established to the "satisfaction" of the Department that they genuinely account for a variance between U.S. price and foreign market value, differences in quantities, level of trade, circumstances of sale, and similar merchandise shall be reflected in adjustments made to the foreign market value. 19 U.S.C. 1677b(a)(4). The purpose of these adjustments is to fulfill the fundamental objective of the antidumping statute to obtain a fair comparison of prices at which identical or similar merchandise is sold in two different markets, at the same point in a chain of commerce, and under similar commercial conditions. *See e.g. Smith-Corona Group* v. *U.S.,* 713 F.2d 1568 (Fed. Cir. 1983).

In 1980, Congress promulgated the antidumping duty regulations, 19 C.F.R. §§ 353.03 –.57 (1980). Section 353.16 of the Regulations, 19 C.F.R. § 353.16, deals with adjustments to be made due to the differences in physical characteristics:

> In comparing the U.S. price with the selling price in the home market, or for exportation to countries other than the United States in the case of similar merchandise, due allowance shall be made for differences in the physical characteristics of the merchandise in the markets being compared. In this regard, *the Secretary will be guided primarily by the differences in cost of production,* to the extent that it is established to his satisfaction that the amount of any price differential is wholly or partly due to such differences, *but, when appropriate, the effect of such differences upon the market value of the merchandise may also be considered.* In the case of merchandise which does not lend itself to comparison with other merchandise for the purpose of this Section, any method reasonably calculated to reflect the impact on cost or value of any differences in the

[3]Plaintiff's brief at 11.

merchandise under consideration may be used. (Emphasis added.)

In the instant case the ITA declined to make adjustments for physical differences on the ground that, because Trommelen did not provide it with any cost data, the ITA was "precluded from making any adjustments for physical differences."[4] (Defendant's Brief at 23.)

Defendant correctly contends that the regulation (§ 353.16) "dictates a clear preference for making adjustments for physical differences when differences in price are due to variations in the costs of production." (Defendant's Brief at 22.) However, defendant goes on to state that "adjustments for physical differences based upon differences in market value are explicitly discretionary and certainly not mandatory as plaintiff contends." (Defendant's Brief at 22, 23.) This position ignores the words of the regulation itself, which clearly states that "due allowance shall be made for differences in the physical characteristics of the merchandise * * *" (emphasis added). 19 C.F.R. § 353.16.

Section 353.16 mandates by its terms that an adjustment be made in appropriate cases when foreign market value is determined according to the price at which "similar" merchandise is sold in the home market or for exportation to third countries. The regulation does state that differences in cost of production shall be the primary consideration in comparing the home market price to the U.S. price. But the regulation also describes other bases of consideration which may be used when appropriate, e.g., differences in market value, and "any method reasonably calculated to reflect the impact on cost or value of any differences under consideration." 19 C.F.R. § 353.16. It is true that the latter two bases of consideration are discretionary inasmuch as, in the absence of differences in costs of production, no one method is mandated. However, this does not negate the mandatory effect of the statute and regulation as a whole. Although cost differences are the preferred basis, the regulation specifically contemplates and authorizes other methods as well. "[D]ue allowance shall be made for differences in the physical characteristics * * *"—if there are no differences in cost of production or if this information is unavailable, than any reasonable method to determine such differences may be used. *Id.*

It is uncontroverted that the ITA asked Trommelen to submit cost of production data for glue on a grade-by-grade basis. Defendant states that Trommelen failed to provide these cost figures, submitting instead a list of prices for various glue strengths. Plaintiff insists that Trommelen cooperated fully in the ITA review investigation, but that Trommelen was simply unable to comply with ITA's request, as this data did not exist. In any case, defendant con-

[4]The ITA stated in its final determination that "[t]he Department requested cost of production data * * * so that we could * * * make adjustments for physical differences in merchandise. The producer failed to provide adequate data, and as a result, we make comparison * * * (without adjustments for differences) * * *." (Defendant's Brief 24; R. 244.)

cluded that "when Trommelen failed to provide any cost data, the ITA was precluded from making any adjustments for physical differences." (Defendant's Brief at 23.) As indicated above, the fact that ITA had no data regarding cost of production did not in itself preclude ITA from making any adjustments for physical differences, as 19 C.F.R. § 353.16 provides other bases on which adjustments can be made.

Plaintiff alleges, and defendant admits, that Trommelen, while it did not submit data regarding cost of production, did submit information regarding the prices at which it sold various grades of glue in each of its markets. (R. 70–80.) Eschem, Inc., another importer of animal glue manufactured by Trommelen, furnished the ITA with a submission showing how price data could be used to make adjustments for the differences in the bloom-strength of the merchandise being compared. (R. 195–221.) However, given that Trommelen's price data indicated that the same bloomgram strength was sold at different prices in the home market[5] and that Trommelen had indicated that there is in fact an inverse relationship between the strengths of glues and their cost of production[6], defendant was justified in declining to make adjustments due to differences in physical characteristics. In fact, to make such adjustments, defendant would have had to rely solely on home market prices, and for the reasons set out above, those prices had been demonstrated not to be dispositive of the issue of value, and by extension, of physical difference.

Given the fact that Trommelen failed to provide the requested cost of production information and that the price information in question was not a reliable indicator of value, the ITA used other information, i.e., the "best information available." Indeed, 19 U.S.C. § 1677e(b) requires that the ITA do so:

> In making their determinations * * * the administering authority * * * shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, * * * use the best information otherwise available.

This statute was discussed in *Atlantic Sugar, supra,* where the Court noted "the use of the mandatory term 'shall', indicating that the ITC *must* use the best information otherwise available in the enumerated circumstances." (Emphasis in original.) 744 F.2d 1556 at 1560. On this basis ITA declined to make an adjustment to foreign market value for physical differences in the merchandise, and the Court finds that this denial is supported by substantial evidence and is otherwise in accordance with law.

3. *Whether ITA's use of sales of 300 bloomgram glue as the basis for determining foreign market value for grade 250 glue is supported by substantial evidence and is otherwise in accordance with law?*

[5]Defendant's Brief at 17.
[6]Plaintiff's Brief at 29. This assertion was reiterated and elaborated upon by plaintiff's counsel at oral argument.

Plaintiff's final argument is that the ITA's use of sales of 300 bloomgram glue as the basis for determining foreign market value for grade 250 glue was unlawful.

Plaintiff states that in the first Section 751(a) review the ITA determined margins of dumping by comparing the prices in the home market of glues which were most similar to the merchandise exported to the U.S. For example, in appraising sales of 250 bloomgram glue, ITA determined foreign market value by comparing it to home market sales of 230 bloomgram glue. In the next review, which is the subject of this case, ITA instead compared the imported glues with higher grade glues sold in the home market; e.g. 250 bloomgram glue was compared to 300 bloomgram glue. Plaintiff states that this was unlawful on the grounds that, *inter alia*, ITA ignored its obligation to make determinations on the basis of the "best information available".

This Court recently addressed a challenge to the ITA's use of the best information rule in *Seattle Marine Fishing Supply Co.* v. *U.S.*, —— CIT ——, 679 F.Supp. 1119 (1988), in which the Court indicated that in challenges to the use of best information available the issue is not which, of all the information ITA has to choose from, is the best information available, but rather, whether the information chosen by ITA is supported by substantial evidence on the record. In *Seattle Marine*, ITA refused to consider a questionnaire response from an exporter of the goods in question on the basis that the response was untimely. Plaintiff argued that, despite the delay, the response was submitted in sufficient time to allow its verification before the final determination was made. Therefore, plaintiff claimed that this response, and not the information actually relied upon by the ITA, was the best information available. The Court rejected this argument, stating that "[t]he issue is not, as plaintiff would argue, whose information becomes the best information *otherwise* available, but whether or not evidence on the record supports the ITA's decision." *Id.* at 1128. (Emphasis in original.)

It is well established that in challenges to administrative reviews this Court must sustain the ITA's determination unless it is found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1982). Substantial evidence has been held to be more than a "mere scintilla", but sufficient to reasonably support a conclusion. *Ceramica Regiomontana, S.A.* v. *U.S.*, —— CIT ——, 636 F.Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

In the instant case the Court finds that there is sufficient evidence in the record to support ITA's use of 300 bloomgram glue as a basis of comparison with U.S. sales of grade 250 for the purpose of determining foreign market value, despite ITA's admission that grade 230 glue appeared to be more similar.

As indicated earlier, 19 U.S.C. § 1677b and 19 U.S.C. 1677(16), when read together, require that when using "similar" merchandise

as a basis of comparison in determining foreign market value, the first of the three categories set out § 1677(16) which is applicable is to be used. This generally results in the most similar merchandise being used, as the three categories set out in the statute are progressively less specific and precise. In this case the Court finds that the first applicable category is § 1677(16)(C),

> (C) Merchandise—
>
> (i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
>
> (ii) like that merchandise in the purposes for which used, and
>
> (iii) which the administering authority determines may reasonably be compared with that merchandise.

Because the Court finds that both grade 300 glue as well as grade 230 glue may reasonably be compared with grade 250 glue, the Court must sustain ITA's use of grade 300 glue in accordance with the standard of review set out in § 1516a(b)(1)(B). As stated in *Matsushita Electric Industrial Co.* v. *U.S.*, 750 F.2d 927, 933 (Fed. Cir. 1984), "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."

(Slip Op. 89–20)

AMERICAN MOTORISTS INSURANCE CO., PLAINTIFF *v.* QUINTIN L. VILLANUEVA, JR., REGIONAL COMMISSIONER OF CUSTOMS, PACIFIC REGION; WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS; AND THE U.S. CUSTOMS SERVICE, DEFENDANTS

Court No. 89–01–00030

Before NICHOLAS TSOUCALAS, *Judge.*

[Plaintiff's motion for a preliminary injunction denied; defendants' Rule 12(b)(5) cross-motion granted; action dismissed.]

(Decided February 15, 1989)

Russotti & Barrison (Harvey Barrison, Philip Russotti and *Sherri L. Goldsmith);* also on the brief: *Christy & Viener (Kenneth W. Taber)* for plaintiff.

John R. Bolton, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(James A. Curley)* for defendants.

OPINION

TSOUCALAS, *Judge:* Plaintiff American Motorists Insurance Company, a surety authorized by the Secretary of the Treasury under 19 U.S.C. § 1623 and 31 U.S.C. § 9301 *et seq.* (1982) to write bonds,

moves for injunctive relief against enforcement of 19 C.F.R.§ 113.38. Defendants oppose and cross-move to dismiss for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(5) of the Rules of this Court.

BACKGROUND

19 C.F.R. § 113.38 provides for disciplinary sanctions against a surety which is "significantly delinquent" in resolving outstanding debt claims against bonds it has secured. The United States Customs Service (Customs) accumulated 113 claims against plaintiff over the course of the last several years in connection with bonds for which the principals failed to pay.[1] To apprise plaintiff of these outstanding claims, Customs mailed four separate notices to plaintiff for each of 113 claims.[2] Plaintiff did not make a concerted effort to rebut these claims in accordance with 19 C.F.R. § 113.38 nor did plaintiff file a petition, prompting Customs to conclude that plaintiff's nonpayment is without adequate cause.

On December 22, 1988, defendant Quintin L. Villanueva, Jr., Regional Commissioner of the U.S. Customs Service, Pacific Region, sent plaintiff a formal demand letter which stated:

> Within 14 days of receipt of this notice, payment must be made, or justification provided for failure to pay, or you must demonstrate the existence of a significant legal issue which justifies further delay in payment.

Letter from Q. Villanueva to Plaintiff (Dec. 22, 1988), *Administrative Record* at 2. The letter also contained a warning that failure to adequately reply to this letter would lead to disciplinary actions under 19 C.F.R. § 113.38. Plaintiff's attorney-in-fact James M. Gorman[3] responded on January 10, 1989:

> To begin with the United States Customs Service has failed to produce adequate documentation to justify any debt. Pursuant to 19 C.F.R. 113.38, your office may only refuse to accept additional obligations by the surety to the extent its assets are unencumbered. If we were to add up the purported debt stated on your enclosures, the amount would not exceed the surety company's worth. To attempt to refuse to accept any further bonds would not be in accordance with the Customs regulations.
>
> The Honorable Peter K. Leisure on November 25, 1988, entered a decision in the U.S. District Court for the Southern District of New York in the matter, *American Motorists Insurance Company* v. *United Furnace Co., Inc.* The decision in part states

[1] Plaintiff stated during the preliminary injunction hearing held on Feb. 3, 1989 that one of the 113 claims was resolved.

[2] "For each claim, the Customs first issues a demand for payment to the principal, a copy of which is mailed to the surety. When the principal fails to pay, a demand for payment is made directly on the surety. This demand, if not paid, petitioned or protested, is then followed by three successive bills which are addressed to the surety for the now past due amount set forth in the original demand. It is *only* after the surety has ignored *all* of these notices by either failing to pay, [neglecting to supply a satisfactory reason for delay in payment,] petitioning for relief under 19 U.S.C. § 1623(c), or filing a protest under 19 U.S.C.§ 1514, that the Regional Commissioner" will entertain sanction actions under 19 C.F.R. § 113.38. *Defendants' Brief in Opposition to the Motion for a Preliminary Injunction and in Support of Motion to Dismiss* at 19 (emphasis in original) (*Defendants' Brief*).

[3] Mr. Gorman is an Executive Vice-President of C.A. Shea and Company, Inc., a licensed insurance broker specializing in surety bonds virtually exclusively for plaintiff.

> a surety is not to be considered to have a liability until there is a "judicial determination of liability." How can a surety make payments on liquidated damage cases or be considered delinquent based on the Court's decision?

Letter of J. Gorman to Q. Villanueva (Jan. 10, 1989), *Administrative Record* at 7.

Concluding that these grounds do not constitute an adequate defense against the 113 claims, the Regional Commissioner informed plaintiff on January 17, 1989 that commencing at 12:01 A.M., January 27, 1989, plaintiff will be formally designated as a delinquent surety under 19 C.F.R. § 113.38. *See* Letter from Q. Villanueva to J. Gorman (Jan. 17, 1989), *Administrative Record* at 8. Such designation would lead to temporary rejection of new bonds secured by plaintiff in the Pacific Region "for a minimum of five (5) days or until all outstanding delinquencies are resolved, whichever is later." *Id.* The Regional Commissioner also recapitulated the following point in this letter: "the files in question were and are available for your review at the appropriate district Fines, Penalties and Forfeitures Offices." *Id.*

On January 24, 1989, plaintiff moved for a temporary restraining order (TRO) and a preliminary injunction. The Court granted a TRO following oral arguments presented by the parties on January 24, and on February 3, 1989 a full hearing was held to determine whether a preliminary injunction should issue. Mr. Gorman, testifying on plaintiff's behalf, was sole witness at this hearing.

Discussion

The criteria for granting the extraordinary equitable relief plaintiff seeks are: (1) a threat of immediate and irreparable harm; (2) likelihood of success on the merits; (3) that the public interest would be better served by issuing rather than by denying the injunction; and (4) the balance of hardships to the parties favors the issuance of an injunction. *Zenith Radio Corp.* v. *United States,* 710 F.2d 806, 809 (Fed. Cir. 1983); *S.J. Stile Associates, Ltd.* v. *Snyder,* 646 F.2d 522, 525 (CCPA 1981). As a threshold prerequisite, plaintiff bears the heavy burden of proffering substantive claims which deserve more mature and deliberate review. Although this Court recognizes the tentative nature of the opinion on the merits, the degree and number of deficiencies in plaintiff's allegations requires a denial of a preliminary injunction.

Plaintiff mainly raises four substantive allegations: (1) 19 C.F.R. § 113.38 is statutorily prohibitive; (2) alternatively, the application of this regulation was arbitrary, capricious, or otherwise not in accordance with law; (3) the disputed regulation is unconstitutionally vague and violative of substantive and procedural due process; and (4) the Regional Commissioner's decision is an impermissible retaliation against plaintiff's exercise of its first amendment rights.

A. *Likelihood of Success on the Merits*

1. Statutory Basis of 19 C.F.R. § 113.38

The principal authority plaintiff cited for the proposition that the Regional Commissioner's decision exceeds Customs' authority is *Old Republic Insurance Co.* v. *Pitman*, 520 F. Supp. 1225 (CIT 1981). In *Old Republic*, several district directors and one regional commissioner of Customs attempted to prevent eleven insurance companies from writing bonds in areas under the signatory Customs officials' direction. The Customs officials grounded their decision on 31 C.F.R. §§ 223.17 and 223.18 which allow the Secretary of the Treasury to revoke a delinquent certified surety's ability to write bonds. The *Old Republic* court issued a preliminary injunction, noting that the Secretary of the Treasury possesses the exclusive power under 19 U.S.C. § 1623(b)(2), and by derivation under 31 C.F.R. §§ 223.17 and 223.18, to revoke or decertify the privilege of writing bonds. The scope of this ruling was later clarified in order to acknowledge Customs' manifest authority to regulate matters concerning surety bonds.

31 U.S.C. § 9301 *et seq.* grants the Secretary of the Treasury the special prerogative of certifying eligible sureties and revoking that privilege. Since this authority was not delegated to Customs, Customs could not invoke 31 C.F.R. §§ 223.17 and 223.18 to prevent a surety from writing bonds.

19 U.S.C. § 1623 also grants the Secretary of the Treasury the authority over surety bonds. The Secretary delegated his power under 19 U.S.C. § 1623 to Customs. Treas. Order No. 165, *revised*, T.D. 53,654, 89 Treas. Dec. 334 (Nov. 2, 1954). This assignment endowed Customs with substantial regulatory power over surety bond matters, but did not extend to certifying sureties and revoking that privileged status, *see* 49 Fed. Reg. 41,152, 41,156 (Oct. 19, 1984), because the Secretary of the Treasury retains exclusive authority over those proceedings.

A complementary division of authority was thus delineated between the Secretary of the Treasury and Customs: the Secretary of the Treasury certifies a class of sureties which are eligible to secure bonds while Customs has the power to accept or reject bonds offered by a particular member of that certified class. Specifically, Customs may decide, in conformity with the delegated authority under 19 U.S.C. § 1623, to temporarily reject bonds from certified delinquent sureties. *Id.*

2. Application of 19 C.F.R. § 113.38

19 C.F.R. § 113.38, which was promulgated in accordance with 19 U.S.C. § 1623, provides in part:

> (c)(3) *Nonacceptance of bond upon instructions by Commissioner.* The Commissioner may, when he believes the circumstances warrant, issue instructions to the district directors and

regional commissioners that they shall not accept a bond secured by an individual or corporate surety when that surety, without just cause, is significantly delinquent either in the number of outstanding bills or dollar amounts thereof.

(4) *Notice of surety.* The appropriate Customs officer may take the above actions only after the surety has been provided *reasonable notice with an opportunity to pay delinquent amounts, provide justification for the failure to pay, or demonstrate the existence of a significant legal issue justifying further delay in payment.*

(5) *Review and final decision.* After a review of any submission made by the surety under paragraph (c)(4) of this section, if the appropriate Customs officer is still of the opinion bonds secured by the surety should not be accepted, written notice of the decision shall be provided to the surety in person or by certified mail

* * * * * * *

Before a "Customs officer" may adopt disciplinary measures against a surety for being "significantly delinquent," a "reasonable notice" of the circumstances warranting sanctions will be provided. Further a surety will be given "an opportunity to pay delinquent amounts, provide justification for the failure to pay, or demonstrate the existence of a significant legal issue justifying further delay in payment." Any rebuttal to Customs' claims will receive administrative scrutiny. *Id.*

Plaintiff principally argues its obligation to comply with 19 C.F.R. § 113.38(c)(4) was obviated because the notices it received from Customs did not provide sufficient information for purposes of ascertaining liability. Implication of this assertion is that had Customs provided some "rudimentary claim identification information," *Plaintiff's Reply Memorandum in Support of Its Motion for a Preliminary Injunction and in Opposition to Defendants' Motion to Dismiss* at 1 (*Plaintiff's Reply Memorandum*), including a copy of the bond in issue, plaintiff would have complied with 19 C.F.R.§ 113.38(c)(4) by responding to the 113 claims.[4] In contradistinction to this averment, Mr. Gorman, plaintiff's key witness, repeatedly alluded during the hearing for a preliminary injunction that in spite of insufficiency of evidence, plaintiff supplied Customs with justification for nonpayment for each of the 113 claims on numerous occasions. Neither position is supported by the administrative record.

The germane inquiry regarding the notice requirement is whether Customs provided plaintiff with "reasonable notice" so that plaintiff could comply with 19 C.F.R. 113.38(c)(4). Invoking *Old Republic Insurance Co.* v. *United States*, 10 CIT 1, 625 F. Supp. 983 (1986), plaintiff maintains that a condition precedent to complying

[4]The shade of this contention varies. In *Memorandum of Law in Support of Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction (Plaintiff's Memorandum)*, plaintiff states, "[t]he claims involved here were not in fact accompanied by any documentation; mostly there was not even sufficient information given to identify the bond or entry that was the subject of the claim." *Id.* at 15. In *Plaintiff's Reply Memorandum*, it is argued that Customs should have provided "at a minimum, * * * the bond number, broker name and broker location for each claim." *Id.* at 2.

with 19 C.F.R. § 113.38(c)(4) is a receipt of a copy of bond for the 113 claims. As stated above, plaintiff received several notices for each of 113 claims. The record indicates that a notice contains a copy of Customs Form 5955A, a "Notice of Penalty or Liquidated Damages Incurred and Demand for Payment," which is addressed to the principal and generally contains, *inter alia,* the claim number, port name and code, broker number, name, address, and identification number of the principal, date of entry, entry number, description of merchandise, and payment amount. The record further shows that a bond and entry were included in some of the notices.

Old Republic held that Customs' notice of demand for payment against a bond must contain information which provides "sufficient means of ascertaining the bond against which demand for payment was made" to enable the surety to file a protest under 19 U.S.C. § 1514(c)(2) (1982). *Id.* at 983. In this regard, a demand letter which was devoid of "importer's [or principal's] name, the entry number or the bond for the bill in question" was deemed to be deficient. *Id.* at 985. It cannot be said that *Old Republic* established an inflexible rule which categorically requires Customs to enclose a copy of the bond for each notice of claim and each notice of demand for payment.

Indeed, *Peerless Insurance Co.* v. *United States,* 12 CIT ——, slip op. 88–177 (Dec; 30, 1988), *notice of appeal filed* (Fed. Cir. Jan. 31, 1989), stated that a Customs' demand for payment against a surety for one claim which does not include a copy of the bond in dispute nonetheless constitutes sufficient notice to a surety which is protesting the bill under 19 U.S.C. § 1514(c)(2). It was reasonable to require plaintiff therein to obtain a copy of the bond in issue from the "Customhouse at the port of entry" when it was already furnished with "the name and address of the delinquent importer [or principal], the bill number, billing date, port of entry, document date, entry number, the amount due, and the importer number." *Id.* at 5. Plaintiff in this case was given at least as much information in the original claim notices as well as in the final notice of demand for payment on the 113 claims and similarly could have obtained additional information from the customhouse.

It should be noted at this juncture that the instant case concerns sufficiency of a "reasonable notice" for purposes of 19 C.F.R. § 113.38(c)(4), while *Old Republic* and *Peerless Insurance* involved disputes surrounding sufficiency of "notice of demand for payment" under 19 U.S.C. § 1514(c)(2). The Court views that the controverted regulation demands a less stringent standard of notice than one required" for satisfying 19 U.S.C. § 1514(c)(2). The purpose of notice under 19 C.F.R. 113.38(c)(4) is to elicit a rebuttal from a surety so that the parties may engage in a dialogue within the administrative regime to further explore and clarify the claims in dispute. The notice under 19 U.S.C. § 1514(c)(2), on the other hand, is generally calculated to mark a termination point in administrative procedures to

facilitate transition to judicial proceedings. The degree of accuracy and sufficiency of informational indicia is critical at this point because the plaintiff sureties risk judicial dismissal of their actions if they cannot locate the protestable transactions within the jurisdictional time frame.[5]

The requirement of "reasonable notice" under 19 C.F.R. § 113.38(c)(4) is not associated with such exigency; it occurs antecedent to a notice of demand for payment under 19 U.S.C. § 1514(c)(2). As stated above, plaintiff's principal excuse for noncompliance with 19 C.F.R. § 113.38(c)(4) is that it did not receive copies of disputed bonds in connection with some of the 113 claims and that there were some errors in the documents supporting the several claims.[6] This is precisely the kind of occurrence easily resolved by complying with the regulation, i.e., by demanding an explanation for any discrepancy or by self-gathering the additional data from the customhouse with modest effort and informing Customs as to any information it could not locate with such effort. It is axiomatic that if plaintiff was able to identify the errors that it asserts were contained in some of the 113 claims, then the presumably corrective information was in plaintiff's possession. It is thus difficult to believe that the presently asserted reasons were genuine grounds for not complying with 19 C.F.R. § 113.38(c)(4). If the challenges against the 113 claims were as formidable as plaintiff now asserts them to be, plaintiff could have easily presented plausible defenses at the administrative level, thereby protecting itself against the disciplinary measure that it now faces.

In view of plaintiff's chronic non-compliance with 19 C.F.R.§ 113.38(c)(4) even on those occasions when Customs supplied the documents whose absence is invoked by plaintiff as a defense, plaintiff's allegations amount to post-hoc litigious assertions. The record discloses that plaintiff's rebuttal only addressed about seventeen claims. Thus contrary to plaintiff's allusion, it is not the case that plaintiff furnished Customs with explanations for nonpayment on each of the 113 claims. Further, even on those rare instances when plaintiff made the effort to respond, the content of the responses is notable for lack of regard for sound administration of the law. For instance, one of thirteen form letters with identical substance, exclusive of the particular claim at issue, states:

> Without a copy of the bond, entry and bill the surety can not and will not be in a position to respond any further. Referral to the Justice Department will be a waste of time and resources since they will need the same information we have requested.

[5]This analysis does not affect the adequacy of both types of notice plaintiff received, since they fulfilled the higher notice standard demanded by 19 U.S.C. § 1514(c)(2).

[6]Some of the alleged errors are: wrong surety, cancelled claims, and mitigated amounts paid.

> Why not send us the information and save yourselves the extra work[7]

Plaintiff could have "saved" itself from the disciplinary sanctions through institution of a more efficient record-keeping system; Customs is not plaintiff's private record-keeper. See *Peerless Insurance* at 6–7.

Plaintiff further endeavors to vindicate its position by maintaining that Customs had a practice of providing bond papers with the claims "up until September 10, 1987." *Plaintiff's Memorandum* at 14. The Court does not discern anything in the law which mandates Customs to supply such a document. To the extent such data were provided, it was done out of courtesy and good will to which plaintiff reciprocated with sporadic, unsatisfactory, presumptuous responses. Indeed, with a revamping of prevailing regulations regarding bonds in 1984, including inauguration of 19 C.F.R. § 113.38 and computerized bond control system, Customs appears to have contemplated that sureties will be expected to obtain, through an online computer or manual query procedure, pertinent bond information where a courtesy copy was not generated due to technical or mechanical problems. *See* 49 Fed. Reg. at 41,153. As one court aptly observed, "[t]he use of bonds, rather than a strict requirement of payment for each transaction, involves an element of trust in the conduct of the bonded party." *Hera Shipping, Inc.* v. *Carnes*, 10 CIT 493, 496, 640 F. Supp. 266, 269 (1986). Under the facts of this case, the Court views that plaintiff has abused the trust Customs generously accorded to it.

Alternatively, it is argued that the disciplinary measure is unjustified because "86 of the 113 claims * * * are already the subject of timely petitions." *Plaintiff's Reply Memorandum* at 3. 19 C.F.R. § 172.12, on which plaintiff relies, states in part:

§ 172.12 Filing of petition for relief.

* * * * * * *

(b) *When filed.*

* * * * * * *

(2) The surety will receive notice to pay the liquidated damages if the principal fails to either timely file a petition or to pay or make arrangements to pay the liquidated damages. *The notice will be sent to the surety within 10 days after the expiration of the principals 30-day petitioning period or as soon thereafter as possible. The surety will then have an additional 30 days from the date of this notification to file its own petition for relief.* (Emphasis added).

To be considered timely, a surety must file petition within 30 days of initial notice of its liability as a surety. Plaintiff stated at the

[7] *See e.g.* Letter from G. Gorman to M. Zehner (Dec. 16, 1987), *Administrative Record* accompanying Claim 84–2704–52241.
The record appears to demonstrate that Customs sent plaintiff the information requested in these form letters on at least one occasion, but it is unclear whether plaintiff thereafter offered an explanation for nonpayment in connection with that particular claim.

conclusion of the hearing on February 3, 1989 that it filed petitions within 30 days of the December 22, 1988 notice of formal demand for payment. The record indicates that these petitions are untimely because all the initial notices to plaintiff are dated well before December 22, 1988.

Plaintiff may not attempt to amplify the jurisdictional time period by arguing that the final letter of demand for payment, dated December 22, 1988, was accompanied by copies of Customs Form 5955A. While 5955A states that the recipient has 30 days to file a petition, this document is *addressed to the principal,* only a copy of which is sent to the surety. Customs attaches these forms in its initial notices to the surety to apprise it of the principal's refusal to pay so that the surety may take appropriate actions. *See Defendants' Brief* at 19–20. Attachment of these documents in later notices and in the final letter of demand for payment can only be considered as an act of courtesy to facilitate plaintiff's compliance with 19 C.F.R. 113.38(c)(4). Such a performance of courtesy does not resurrect the applicability of 19 C.F.R.§ 172.12.[8]

Plaintiff also justifies its non-compliance with 19 C.F.R. § 113.38(c)(4) on grounds that *American Motorists Insurance Co.* v. *United Furnace Co.,* 699 F. Supp. 46 (S.D.N.Y. 1988), *appeal docketed,* No. 88–9053 (2nd Cir. Dec. 22, 1988) empowers it to withhold payment on the 113 outstanding claims until payment is ordered by a court decision. *See supra* p. 3. *American Motorists,* a decision rendered by the Southern District Court of New York which is on appeal, appertained to the narrow issue of whether Customs' demand for payment on a surety in connection with an unresolved claim constitutes "liability" under the terms of an indemnification agreement, triggering principal's immediate contractual performance. The court therein found that the matter is not ripe for decision, noting that "there has been no legal action [by Customs against the surety] * * *. [The surety] has made no payment to the Customs Service and has incurred no actual expense or loss." *Id.* at 48.

Being an indemnity action, *American Motorists* has an attenuated precedential value for purposes of resolving a conflict between Customs and a surety. The Southern District Court acknowledged this point: "it is doubtful that this Court would have jurisdiction over" an action between Customs and surety. *Id.* n. 1. Further, obligations to Customs are specifically governed by the pertinent laws, of which 19 C.F.R. § 113.38 is a constituent part. The thrust of this regulation is to *eschew* litigation whenever possible through examination and resolution of the parties' grievances within the regulatory framework. This Court thus believes the Southern District Court's allusion to the timing of a surety's liability to Customs was an observation attributable to the fact that the surety therein *filed a timely petition against Custom's claim, id.* at 48, an unsatisfactory

[8] If Customs' practice of including Customs Form 5955A in later notices is breeding widespread misunderstanding among sureties as to the proper jurisdictional period, then the Court sees the need on the part of Customs to simplify and consolidate the notice processing procedures.

resolution of which would require a judicial determination of liability.

3. Constitutionality of 19 C.F.R. § 113.38

Plaintiff attacks 19 C.F.R. § 113.38 on grounds that it is violative of the Constitution because it is too vague and fails to meet the requirements of substantive and procedural due process. With regard to the vagueness claim, any uncertainty "over the meaning of [significant delinquency] could easily have been clarified by an inquiry directed to agency officials." *Gallagher & Ascher Co.* v. *Simon,* 687 F.2d 1067, 1079 (7th Cir. 1982) (citing *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.,* 455 U.S. 496, 499 (1982)). Further, although an agency has a wide discretion in interpreting the language of the laws it is entrusted to administer, 19 C.F.R. § 113.38 contains several inherent safeguards as a check against abuse. Specifically, subsection (c)(3)provides that whether a surety is "significantly delinquent" will be determined by "either in the number of outstanding bills or dollar amounts thereof." Plaintiff also may contest the application of the disputed term by raising objections against the claims. In any event, the Court is of the opinion that 113 claims against which plaintiff neither made a concerted effort to rebut nor file timely petitions constitute significant delinquency. Under the facts of this case, plaintiff "cannot complain of the vagueness of the law as applied to the conduct of others." *Village of Hoffman Estates* at 495.

The type of interest at stake in this action is a protectible property right under the Constitution. Nonetheless, it could legitimately be curtailed if the particular means chosen is rationally related to the end to be sought. *See Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955). The purpose of 19 C.F.R. § 113.38 is to defend national revenue through efficacious collection of overdue debts. Prescribing informal communication and hearing to examine and weigh the parties' grievances prior to resorting to more cumbersome judicial relief seems to be an exceedingly rational way of processing the collection on the unresolved debt obligations.

The procedural prong of due process demands a "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) (citations omitted). The specific calculus for analyzing the issue was articulated in *Mathews* v. *Eldridge,* 424 U.S. 319 (1976):

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Govern-

> ment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

As stated above, enforcement of disciplinary sanctions will authorize the District Directors of Customs in the Pacific Region to temporarily refuse new bonds secured by plaintiff for five days or until the 113 claims are adequately resolved, whichever is later. The requisite notice requirement was amply satisfied by several letters sent in connection with each of 113 claims against which plaintiff was afforded an opportunity to raise objections.

In view of plaintiff's chronic non-compliance with existing proceedings under 19 C.F.R. § 113.38, it is difficult to discern the probative value of providing plaintiff with additional procedures. Had plaintiff promptly and consistently abided by the existing procedures, a more rigorous analysis of this issue by the Court would have been justified. In this regard, plaintiff is not in a position to attack the adequacy of procedures that the Regional Commissioner follows in reviewing the objections that are raised in conformity with 19 C.F.R. § 113.38(c)(4). Resolution of this question should be reserved to a litigant who conscientiously complied with the regulation. Counterbalancing these factors is the enormous government interests in enforcing laws which are designed to protect the national revenue and in preventing abuse of privilege of writing bonds.

4. Impermissible Retaliatory Act

Plaintiff charges that "there is probably some causal relation and preconceived plan" between the Regional Commissioner's decision and plaintiff's testimony to the United States House of Representatives concerning "corrupt practices of officials in the United States Customs Service." *Plaintiff's Memorandum* at 19–21. The record does not contain any substantiating evidence to this effect. Further, the Regional Commissioner stated in an affidavit that he had no knowledge of any testimony given by plaintiff, rendering improbable that his decision was due to such testimony. See Affidavit of Q. Villanueva, paras. 2–6, in *Defendants' Brief.*

B. *A Threat of Immediate and Irreparable Harm*

In view of plaintiff's chronic failure to avail itself of administrative remedies, any harm plaintiff may suffer upon effectuation of the Regional Commissioner's decision is a consequence of plaintiff's own failings. To grant injunctive relief under the facts of this case is to recompense plaintiff for frustrating orderly administration of the governing laws. A court should generally refrain from displacing a decision made "by the designated executive branch representative having primary responsibility for dealing with the problem entrusted to him." *S.J. Stile Associates,* 646 F.2d at 526. Further, it is not the case that government action in this case "will put plaintiff completely out of business in the affected region." Plaintiff's

Memorandum at 2. "Refusal to accept bonds from a surety which is deemed to be non-responsible is a temporary measure * * *. As soon as the appropriate Customs officer is satisfied that a surety stands ready, willing, and able to resume a normal business relationship with Customs, its bonds will again be accepted." 48 Fed. Reg. 11,032, 11,041 (Mar. 15, 1983).

C. *Public Interest and Balance of Hardships*

The public interest is best served by facilitating Customs' effort to uphold the integrity of the Customs Service by enforcement of laws and regulations designed to effectively safeguard national revenue. To this end, the public clearly has a strong interest in ensuring that administrative procedures, which are reasonably calculated to encourage prompt payment of debt obligations to the government, remain unimpaired. While the Court does not question that there may be some adverse business impact to plaintiff upon effectuation of disciplinary measures pursuant to 19 C.F.R. § 113.38, this hardship is overwhelmingly outweighed by the other three factors governing issuance of a preliminary injunction.

CONCLUSION

Plaintiff has not made the requisite showing for a preliminary injunction. Specifically, plaintiff has not adequately demonstrated that it will likely succeed on the merits. Further, any harm plaintiff may suffer in the absence of the preliminary injunction is a consequence of plaintiff's own failings. Therefore, plaintiff's motion is denied. For these reasons, the Court grants defendant's cross-motion to dismiss for failure to state a claim upon which relief can be granted.

SO ORDERED.

ABSTRACTED CLASSIFICAT

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	
C89/13	Musgrave, J. February 8, 1989	Teltex, Inc.	87–2–00355	Item 355.25 12.9% + 2 cts. per lb.	It

FICATION DECISIONS

	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
ate	Item No. and rate		
	Item 359.60 4.3%	Agreed statement of facts	Savannah Rolls of roofing material consisting of a non-woven fabric core

APPOINTMENT OF ADVISORY COMMITTEE TO THE U.S. COURT OF INTERNATIONAL TRADE; NOTICE

Chief Judge Edward D. Re recently announced the appointment of an Advisory Committee to the Court.

Recent amendments to the Rules Enabling Act authorize and require the appointment of an Advisory Committee to study the rules of practice and internal operating procedures of the court.

The members of the bar of the court appointed to serve on the Advisory Committee provide a balanced cross-section of, and representation for, the principal areas of the court's subject matter jurisdiction. The members include representatives of government agencies, domestic and importer interests, and others who have demonstrated an interest in the rulemaking process and in a just and expeditious system for resolving the disputes coming before the court.

Anyone who wishes to submit recommendations or suggestions for improving the rules or procedures of the court may send them to the Chair of the Advisory Committee:

Charlene Barshefsky, Esq.
Steptoe & Johnson
1330 Connecticut Avenue NW
Washington, DC 20036

Dated: February 24, 1989.

JOSEPH E. LOMBARDI,
Clerk of the Court.

Index

Customs Bulletin and Decisions
Vol. 23, No. 10, March 8, 1989

U.S. Customs Service

Treasury Decisions

Customs Service Decisions

Proposed Rulemaking

U.S. Court of Appeals for the Federal Circuit

Notice

U.S. Court of International Trade

Slip Opinions

Abstracted Decisions

Notice

*U.S. G.P.O. 1989-241-040:80028